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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Towery, et al.,

Plaintiffs,

v.

Brewer, et al.,

Defendants.

Case No. 2:12-CV-00245-NVW

**MOTION BY PLAINTIFF SAMUEL
LOPEZ FOR PRELIMINARY
INJUNCTION**

Expedited Oral Argument and Evidentiary
Hearing Requested

DEATH-PENALTY CASE

**Execution Scheduled
May 16, 2012 at 10 a.m.**

Plaintiff Samuel Lopez, having filed his Complaint in the above-captioned case, moves pursuant to Federal Rule of Civil Procedure 65(a) for a preliminary injunction barring Defendants from executing him on May 16, 2012, under the Arizona Department of Corrections ("ADC")'s execution protocol that went into effect on January 25, 2012 (the "January 2012 Protocol"). Lopez seeks injunctive relief barring Defendants and each of

1 them and/or their agents from acting jointly or severally to execute Lopez on his execution
2 date in a manner that will deprive him of his rights in violation of his First, Fifth, Eighth, and
3 Fourteenth Amendment rights under the United States Constitution and 42 U.S.C. § 1983.

4 In light of his impending execution date, a preliminary injunction is necessary to allow
5 Lopez to litigate his claims. Lopez also requests expedited discovery, oral argument, and an
6 evidentiary hearing on his motion. This motion is supported by the attached memorandum.

7 Respectfully submitted this 1st day of May, 2012.

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14 By: s/Dale A. Baich
15 Counsel for Plaintiffs Rogovich,
16 Stanley, Cook, and Stokley

16 Kelley J. Henry
17 Denise I. Young

18 By: s/Kelley J. Henry (with permission)
19 Counsel for Plaintiff Lopez

1 **MEMORANDUM IN SUPPORT OF MOTION**
2 **FOR PRELIMINARY INJUNCTION**

3 “Because the death penalty is undeniably the most serious penalty available to a State,
4 the procedures for such penalty must be implemented in a reasoned, deliberate, and
5 constitutional manner.” *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012). The State of
6 Arizona has continually failed to implement their execution procedures consistent with this
7 requirement.

8 Since 2007, this Court has heard claims related to the constitutionality of Arizona’s
9 execution procedures. When condemned prisoners have mounted a meritorious challenge
10 to the State’s procedures, the State has responded by changing its written protocol or simply
11 by making avowals of change to the Court, thereby insulating its practices from judicial
12 scrutiny. On January 25, 2012, for the seventh time since the litigation began, Arizona
13 changed its written lethal-injection protocol. In doing so, it removed the previously adopted
14 written safeguards and instead gave complete discretion to the ADC Director. To date, no
15 federal court has undertaken a review of the constitutionality of the January 2012 Protocol
16 as written or as applied.

17 The State of Arizona has executed three prisoners since it last changed its protocol and
18 issued the January Protocol: Robert Moormann (February 29, 2012); Robert Towery (March
19 8, 2012); and Thomas Kemp (April 25, 2012). Moormann’s and Towery’s executions went
20 forward not under the terms of the written protocol, but under the specific terms outlined and
21 accepted by the Ninth Circuit. *See Towery*, 672 F.3d at 653 (“We find ourselves, once again,
22 deciding not the merits of Arizona’s written protocol, but the validity of the litigation-related,
23 often case-specific, amendments to the protocol designed to ensure constitutionality.”).
24 Despite the representations made to this Court and the Ninth Circuit by the State, there were
25 serious problems that occurred during Towery’s execution. Although Towery was punctured
26 at least eleven times, no catheters were placed in either of his arms. Towery was denied
27 access to counsel during this hour-long ordeal, even though he asked, and even though the
28 Director contacted the Attorney General’s office. During the most recent execution, which

1 was carried out pursuant to the January 2012 Protocol (but without the alterations in place
2 for Towery and Moormann), Kemp had a catheter placed in his femoral area and in his left
3 arm. Witnesses also reported that Kemp shook violently for approximately six seconds
4 before becoming unconscious.

5 In their Second Amended Complaint, Plaintiffs assert that the January 2012 Protocol
6 violates their constitutional rights on six grounds: (1) safeguards that Defendants previously
7 adopted to comply with the Eighth Amendment have been abandoned (*see* 2d Am. Compl.
8 ¶¶ 130-144); (2) the discretionary nature of the January 2012 Protocol as written violates the
9 Equal Protection Clause by treating similarly situated death-row prisoners differently and
10 burdening their fundamental rights without providing adequate justification (*see id.* ¶¶ 171-
11 87); (3) the discretionary nature of the January 2012 Protocol as applied violates the Equal
12 Protection Clause by treating similarly situated death-row prisoners differently and burdening
13 their fundamental rights without providing adequate justification (*see id.* ¶¶ 188-97); (4) the
14 January 2012 Protocol provides inadequate notice as to the specific drug protocol and type
15 of venous access to be used in an execution (*see id.* ¶¶ 198-209); (5) limitations on pre-
16 execution attorney visits in the January 2012 Protocol violate Plaintiffs' rights to access
17 counsel and the courts (*see id.* ¶¶ 210-20); and (6) limitations on access to counsel during an
18 execution violate Plaintiffs' right to be free from cruel and unusual punishment (*see id.* ¶¶
19 221-27).

20 In light of the impending execution date, a preliminary injunction is necessary to allow
21 Lopez to litigate his claims.

22 **I. Factual Background Before 2012**

23 In 2007, a group of prisoners sentenced to death in Arizona brought an action for
24 injunctive relief under 42 U.S.C. § 1983, alleging that Defendants' lethal-injection
25 procedures violated the Eighth Amendment by allowing untrained and unqualified
26 individuals to conduct executions, and requiring the use of a central femoral line to
27 administer execution drugs. *Dickens v. Brewer*, No. 2:07-cv-1770 (D. Ariz.) (Compl., Sept.
28 14, 2007, Dkt. No. 1). In the course of that litigation, Defendants agreed to amend the

1 protocol to add crucial safeguards that decreased the risk of harm to condemned prisoners.
2 In particular, Defendants agreed to set peripheral IV lines as the default access and to
3 conduct proper vetting of individuals before retaining them to participate in executions. The
4 court found that the protocol, once amended, did not violate the Eighth Amendment, and that
5 there was no risk that ADC would intentionally deviate from its amended protocol. *Dickens*
6 *v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

7 In fact, during the five executions carried out in 2010-2011, Defendants *did* deviate
8 from the lethal-injection protocol in key ways, repeatedly failing to implement and adhere
9 to the very safeguards they adopted in *Dickens* to comply with the Eighth Amendment. *See*
10 *generally West v. Brewer*, No. 2:11-cv-01409, 2011 WL 6724628 (D. Ariz. Dec. 21, 2011).¹
11 Defendants did not conduct background checks on medical team members before allowing
12 those members to participate in executions, and one medical team member participated in all
13 five executions despite his criminal background. *Id.* at *7. The medical team members did
14 not have current experience in placing intravenous lines and one of the two members was not
15 a licensed medical professional. *Id.* at *20-21. In all but one execution, Defendants deviated
16 from the amended requirement that lethal drugs would “by default be administered through
17 a peripheral intravenous line,” and instead adopted a femoral central line as the default
18 procedure. *Id.* at *14.

19 Defendants admitted that they had failed to follow their protocol, but took the position
20 that these deviations were acceptable because ADC Director Charles Ryan had authorized
21 them. *Id.* Asked to explain the many core deviations from the written protocol, Director
22 Ryan testified that the written protocol provides him virtually unlimited discretion to deviate
23 from its terms as he sees fit. *See West v. Brewer*, Doc. No. 104, Ex. 264 (Dep. Charles Ryan)
24 at 150-153.

25
26 ¹In 2011, the *Dickens* plaintiffs, along with Thomas West, brought an action for
27 injunctive relief against Defendants, this time alleging that by repeatedly deviating from the
28 lethal-injection protocol found facially constitutional in *Dickens*, Defendants were violating
plaintiffs’ constitutional rights. *See West v. Brewer*, No. 2:11-cv-01409 (D. Ariz, filed July
16, 2011).

II. Factual Background: 2012

On January 25, 2012, Defendants issued the January 2012 Protocol, which codified Defendants' position that ADC has unlimited discretion when carrying out executions by removing or altering nearly all of the safeguards added during the *Dickens* litigation, effectively giving the Director unfettered discretion to determine how each execution is performed. By eliminating clear standards for qualifications for execution team members (medical licensure and current, relevant experience are no longer required), the January 2012 Protocol significantly lowers the experience and qualification requirements for medical execution team members, allowing for the possibility that minimally qualified or even incompetent personnel will conduct executions.

The January 2012 Protocol also eliminates the use of a peripheral catheter as the default method for administering execution drugs. Instead, the ADC Director has complete discretion to decide whether to use peripheral or central femoral IV access, and the January 2012 Protocol does not inform prisoners when or how the Director will determine which type of IV access will be used. Unlike peripheral IV access, the placement of a central line is an invasive surgical procedure. (*See* Excerpted Testimony of Eric Katz, M.D., Trial Tr., Dec. 7, 2011, *West v. Brewer*, No. 2:11-cv-1409 (D. Ariz.), attached as Ex. BB at 19-25.) Placing a central femoral line requires the use of a larger needle than would be used for establishing a peripheral line, and the needle must be inserted into a femoral vein which, unlike a peripheral vein, is not visible from the skin. (*Id.* at 21.) Whereas placement of a peripheral IV requires the needle to go through only the skin to reach a vein, peripheral IV placement requires pushing the needle through the skin, the subcutaneous tissue, and the muscle before reaching the vein. (*Id.*) After the needle is inserted, a guide wire must be threaded through the needle into the vein. (*Id.*) Once the guide wire is in place, the skin is incised with a scalpel so that a plastic introducer piece approximately 4-5 millimeters long can bore a hole from the skin all the way to the vein and into the vein itself. (*Id.* at 21-22.) The catheter is then sutured to the skin using thread or staples. (*Id.* at 23-24.) Complications can arise from setting a femoral line—such as puncturing the femoral artery, tearing the femoral vein, or

puncturing the bladder—that would not arise in setting a peripheral IV. (*Id.* at 50-51.) Accordingly, only medical personnel with extensive training in this specific procedure should attempt to insert a femoral line. The January 2012 Protocol does not require that a person setting a femoral line have specific experience in performing this surgical procedure.

Finally, unlike prior ADC execution protocols,² the January 2012 Protocol denies condemned prisoners legal visits after 9:00 p.m. the day prior to a scheduled execution. Condemned prisoners are now allowed only telephonic contact with attorneys of record, which will take place in a holding cell in the presence of ADC officers with no opportunity for privileged communication.

This Court, and the Ninth Circuit, recently had a chance to review similar issues related to the constitutionality of the January 2012 Protocol. *See Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012); *Towery v. Brewer*, 2012 WL 592749 (D. Ariz. Feb. 23, 2012). While the Ninth Circuit denied the preliminary injunction motion for Robert Moormann and Robert Towery, it did so on different grounds than did the district court. *Towery*, 672 F.3d at 653. The Ninth Circuit permitted the executions of Moormann and Towery to proceed *not* based on the January 2012 Protocol, but *rather* based on the protocol “as amended by the State during oral argument.” *Id.*

The Ninth Circuit relied on several critical representations made by Defendants’ counsel in denying petitioners’ request for a preliminary injunction.

²See ADC Internal Management Procedure 500.4 (Feb. 4, 1986) Section 4.4.5 (“Visits from the Attorney of Record and a Chaplain of condemned inmate’s choice shall be permitted up to ½ hour prior to the scheduled time of the execution.”); Internal Management Procedure 500 (Mar. 10, 1993) Section 5.6.3.6 (“Non-Contact Visits from the Attorney of Record and a Chaplain of condemned inmate’s choice shall be permitted up to two hours prior to the scheduled execution.”); Internal Management Procedure 500.4 (Dec. 24, 1994) Section 5.2.1.2.4 (“Visits from the Attorney of Record and a Chaplain of condemned inmate’s choice shall be permitted up to one-half hour before the scheduled execution time.”); Department Order 710-IO-F (Nov. 5, 2004) Section 1.3.3.5 (“Visits from the Attorney of Record and a Department Chaplain of condemned inmate’s choice are permitted up to forty-five (45) minutes prior to the scheduled execution.”); Department Order 710.09 (Sept. 15, 2009) Section 1.6.2 (“The inmate’s visitation privileges shall be terminated at 2100 hours the day prior to the execution, excluding non-contact visits with the inmate’s Attorney of Record and facility chaplain as approved by the Division Director for Offender Operations.”); Department Order 710.09 (May 12, 2011) Section 1.5.2 (same).

1 First, the Ninth Circuit relied on and adopted Defendants' representations regarding
 2 the qualifications of the IV Team. Defendants informed the Ninth Circuit that the IV team
 3 chosen for Moormann's and Towery's executions was "comprised of a licensed nurse with
 4 seventeen years of experience and a medically-licensed physician." *Id.* at 658. Moreover,
 5 Defendants informed the Court that "[b]oth of these individuals have had experience placing
 6 IVs within the last twelve months," outside of the execution context. *Id.*

7 Second, the Ninth Circuit relied on and adopted Defendants' representation regarding
 8 backup drugs. *Id.* In its opinion, the Court noted that Defendants represented that they
 9 would have an additional set of syringes of backup drugs during the executions of Towery
 10 and Moormann. *Id.* The Defendants also represented, and the Ninth Circuit relied upon and
 11 adopted, that there would be a primary catheter and a backup catheter. *Id.*

12 Finally, the Court found critical that Defendants represented that Towery and
 13 Moormann would be permitted in-person legal visits during the morning of the execution.
 14 *Id.* The Court indicated that its opinion was based on the "long-standing ADC practice, as
 15 reflected in Department Order 710–IO–F (Nov. 5, 2004), § 710.02, ¶ 1.3.3.5." *Id.*

16 **A. Execution of Robert Moormann**

17 Robert Moormann was scheduled to be executed on February 29, 2012, at 10:00 a.m.
 18 (Letter from Charles Ryan to the Arizona Supreme Court, dated February 9, 2012, Re:
 19 Execution of Robert Moormann, attached as Ex. EE.) Consistent with the Ninth Circuit's
 20 opinion, Moormann's attorneys visited with him until 9:15 a.m. on the morning of his
 21 execution. (Declaration of Angela Fairchild, dated April 30, 2012, attached as Ex. DD,
 22 Attach. 6 at 2.)

23 According to Defendants' records,³ the restraint/escort team was ready at 9:39 a.m.
 24 (Ex. DD, Attach. 4 at 1.) By 9:50 a.m., Moormann was restrained and secured to the
 25 execution table. (Ex. DD, Attach. 4 at 2.) Defendants' log notes that at 9:55 a.m., the
 26 Director "shall determine the catheter(s) site(s)." (Ex. DD, Attach. 4 at 3.) By 10:05 a.m.,

27
 28 ³Counsel for Defendants provided to Plaintiffs' counsel execution logs that ADC
 maintained during Towery's and Moormann's executions. (Ex. DD, ¶ 3.)

1 the IV procedure was completed (Ex. DD, Attach. 4 at 3), and it was noted that the left
2 peripheral catheter was the primary IV line and the right peripheral catheter was the backup
3 IV line (Ex. DD, Attach. 5 at 2).

4 At 10:19 a.m., all witnesses to Moormann's execution were in place (Ex. DD, Attach.
5 4 at 3), and the injection of the lethal drugs began at 10:23 a.m. (Ex. DD, Attach. 5 at 2).
6 Moormann was pronounced dead at 10:33 a.m. (Ex. DD, Attach. 5 at 2.)

7 **B. Execution of Robert Towery**

8 Robert Towery was scheduled to be executed on March 8, 2012, at 10:00 a.m. (Letter
9 from Charles Ryan to the Arizona Supreme Court, dated February 17, 2012, Re: Execution
10 of Robert Towery, attached as Ex. FF.) Consistent with the Ninth Circuit's opinion,
11 Towery's attorneys visited with him until 9:15 a.m. that morning. (Declaration of Dale A.
12 Baich, dated April 30, 2012, attached as Ex. Y ¶ 3 ; Ex. DD, Attach. 3 at 2.)

13 According to Defendants' records, what happened in the half-hour after Towery's
14 legal visit was very similar to what took place in preparing Moormann for his execution. The
15 restraint/escort team was ready at 9:38 a.m. (Ex. DD, Attach. 1 at 2.) By 9:49 a.m., Towery
16 was restrained and secured to the execution table. (Ex. DD, Attach. 1 at 3.) Defendants' log
17 notes that at 9:52 a.m., the Director "shall determine the catheter(s) site(s)." (Ex. DD,
18 Attach. 1 at 4.)

19 What happened next, however, is quite different. Defendants' records report that at
20 10:28 a.m., "[a]fter multiple attempts of the left and right peripheral [] (approximately 4 in
21 right - 2 in left), IV Team Leader recommended right femoral [catheter] as [the] primary [IV
22 line] and left peripheral [catheter] as back-up [IV line]." (Ex. DD, Attach. 1 at 4.) The
23 recommendation of setting a left peripheral catheter as the backup line is particularly
24 questionable given that there were multiple unsuccessful attempts in setting a line in that
25 location. (Declaration of Eric M. Katz, M.D., dated April 30, 2012, attached as Ex. AA, ¶ 7.)

26 At 10:31 a.m., the Director called the Attorney General's office and provided "an
27 update regarding the IV process." (Ex. DD, Attach. 1 at 4.) At 10:37 a.m., the Director
28 spoke with Jeff Zick at the Attorney General's office. (Ex. DD, Attach. 1 at 4.) Defendants'

1 records provide no additional information regarding why the Attorney General's office was
2 notified.

3 At some point during the attempts to set the IV lines, Towery asked to speak with his
4 counsel, Dale Baich, but he was not permitted to do so. (Ex. Y, ¶¶ 12, 15, 16.) At
5 approximately 10:45 a.m., Towery's execution had not yet started. Baich, who was waiting
6 to witness the execution, asked an ADC employee if there was a problem and if there was
7 anything to report regarding Mr. Towery or the execution procedure. (Ex. Y ¶ 6.) The ADC
8 employee checked with the command center and informed Baich that command had nothing
9 to report. (Ex. Y ¶ 6.)

10 At 10:50 a.m., the right femoral catheter was placed, but Defendants' records indicate
11 that the left peripheral catheter was unsuccessful. (Ex. DD, Attach. 1 at 4.) The Director had
12 a discussion with the IV Team Leader regarding the back-up IV line. (Ex. DD, Attach. 1 at
13 4.) At 10:59 a.m., a catheter was placed in Towery's right hand as a backup line to the
14 femoral catheter. (Ex. DD, Attach. 1 at 4.) The logs indicate that the IV procedure was
15 finally complete approximately one hour after it started. (Ex. DD, Attach. 1 at 5.)

16 At 11:13 a.m., all witnesses to Towery's execution were in place (Ex. DD, Attach. 1
17 at 5), and the injection of the lethal drugs began at 11:17 a.m. (Ex. DD, Attach. 2 at 2).
18 Towery was pronounced dead at 11:26 a.m. (Ex. DD, Attach. 2 at 2.)

19 The IV team member(s) responsible for setting Towery's IV lines punctured Towery
20 multiple times without ever successfully setting a peripheral line in the arm (Ex. DD, Attach.
21 1 at 4), but an autopsy of Towery revealed that the peripheral veins near his elbows were
22 delicate without signs of sclerosis; that is, the veins were not hardened and had no scarring.
23 (See Private Autopsy Examination of Robert Charles Towery, Performed by Joseph Cohen,
24 M.D., dated April 2, 2012, available at ECF No. 54-1, Ex. W at 3). In other words, Towery
25 had good veins. These critical difficulties are unsurprising, given that ADC removed the
26 previous protocol's medically reasonable proviso that ADC staff assess the condition of the
27
28

prisoner's veins in the days before an execution.⁴

Defendants determined that the backup line should be in the hand, even though the doctor who ADC hired to conduct its executions in 2010-2011 testified that it would be painful to administer a large amount of barbiturate through a small peripheral vein in a lower extremity. (*See* Excerpted Testimony of Medical Team Leader, Trial Tr., Dec. 6, 2011, *West v. Brewer*, No. 2:11-cv-1409 (D. Ariz.), attached as Ex. CC at 32-33.)

C. Execution of Thomas Kemp

Thomas Kemp was scheduled to be executed at 10:00 a.m. on April 25, 2012. (Letter from Charles Ryan to the Arizona Supreme Court, dated March 28, 2012, Re: Execution of Thomas Kemp, attached as Ex. GG.)

Via letter dated March 22, 2012, Director Ryan informed counsel for Thomas Kemp that no more than two legal visitors would be permitted to see Kemp and that they would only be permitted a one-hour visit from 6:00 a.m. until 7:00 a.m. (Letter from Ryan to Baich, dated March 22, 2012 (ECF No. 54-1, attached as Ex. U).) This procedure was inconsistent with the Ninth Circuit's opinion in *Towery*. *See Towery*, 672 F.3d at 658 (noting that the

⁴Moreover, although Director Ryan appears to blame any difficulties on the courts by noting that *Towery's* execution was "more challenging because of the mandated order regarding two catheter points" (Ex. DD, Attach. 1 at 7), it was not the court that "mandated" two catheter points. Rather, it was Defendants' counsel who stated in the brief to the Ninth Circuit, and again during oral argument, that "[t]he protocol also requires the use of a back-up IV catheter." (*Towery v. Brewer*, No. 12-15381, ECF No. 9 (9th Cir. Feb. 27, 2012)); *see also Towery v. Brewer*, No. 12-15381, Oral Argument of Assistant Attorney General Jeffrey Zick (Feb. 27, 2012), available at <http://www.ca9.uscourts.gov/media/>, 38:45-38:50 ("There is a backup IV catheter being placed in the inmate"), 43:58-44:02 ("there is two IV catheters, one primary, and one backup"). For Defendants to say the execution was challenging because of the court's mandate is yet another example of ADC not following—or even knowing, its own procedures.

Furthermore, Director Ryan also attempts to cast blame on the delayed execution to the attorney visitation, which ended at 9:15 a.m. (Ex. DD, Attach. 1 at 7.) However, this alleged concern was not indicated in Moormann's execution log, and Moormann had the same time frame for his legal visitation with his attorney on the morning of his execution.

Finally, Director Ryan asserts that *Towery's* "bad veins" also contributed to the delay. (Ex. DD, Attach. 1 at 7.) As Lopez has demonstrated in this motion, *Towery* did not have "bad veins."

ADC's attempt to direct blame at others, rather than considering the fact that the procedures in place are not sufficient for ensuring a safe and humane execution is contrary to constitutional principles. *See Towery*, 672 F.3d 653 (noting that procedures must be "reasoned, deliberate, and constitutional").

1 in-person visits will be permitted “under the long-standing ADC practice”).⁵ Indeed, when
2 Director Ryan was asked about the possibility of a visit consistent with the Ninth Circuit’s
3 order in *Towery*, he challenged the Ninth Circuit’s decision—saying the Court “incorrectly
4 relied” on an older protocol, and noting that although ADC “agreed” to the court-ordered
5 visitation, it “did not waive the right to exercise [his] discretion on the scheduling of future
6 visits with death row inmates.” (See Letter from Charles Ryan to Dale Baich, April 2, 2012,
7 Ex. JJ.)

8 While Director Ryan informed Kemp that ADC intended to carry out his execution
9 using a one-drug protocol with pentobarbital, he stated that back-up chemicals would not be
10 prepared in syringes unless they are required. (ECF No. 54-1, attached as Ex. U.) The
11 failure to prepare backup drugs was inconsistent with the Ninth Circuit’s opinion in *Towery*.
12 See *Towery*, 672 F.3d at 658 (noting that “one additional set of syringes , along with the
13 necessary chemicals and drugs, [would be] available for immediate administration should
14 circumstances so require”).

15 Before Kemp’s execution started, his attorney Tim Gabrielsen, along with other
16 witnesses, was informed by an ADC employee that Kemp would be sedated and that after
17 ADC personnel verified that he was sedated, the lethal drugs would be injected. (See
18 Declaration of Timothy M. Gabrielsen, dated April 30, 2012, ¶ 5 attached as Ex. X.)
19 Gabrielsen raised the concern with an ADC employee that Kemp was going to be injected
20 with drugs after he was sedated, because a sedation check followed by injection of lethal
21 drugs is required only with the three-drug protocol. (Ex. X, ¶¶ 6-7.) The ADC employee did
22 not answer his question. (Ex. X, ¶ 7.) Eventually another ADC official told Gabrielsen that
23 Kemp would be executed using a one-drug protocol. (Ex. X, ¶ 9.)

24 Kemp’s execution began at approximately 10:00 a.m. (Ex. GG.)⁶ Kemp appeared to
25

26 ⁵The Ninth Circuit cited a protocol that allowed attorney-client visits up until 45
27 minutes before the execution

28 ⁶Counsel for Plaintiffs have not yet been provided any documentation on Kemp’s
execution from Defendants.

1 have a femoral catheter in his groin. (Ex. X, ¶ 10.) Kemp had no IV lines in his right arm.
 2 (Ex. X, ¶ 10.) Witnesses were not able to see his left arm.

3 During Kemp's final statement, his attorney heard him say "I regret nothing" and
 4 heard nothing else. (Ex. X, ¶ 11.) Kemp's lips appeared to continue moving despite the
 5 witnesses not being able to hear him say anything else. (Ex. X, ¶ 11.)

6 Shortly after the execution began, Kemp's right arm and his torso began violently
 7 shaking. (Ex. X, ¶ 12.) This occurred for approximately five or six seconds. (Ex. X, ¶ 12.)
 8 This could have been a partial seizure potentially caused by the administration of
 9 pentobarbital. (Ex. AA, ¶ 9.) Kemp was pronounced dead at 10:08 a.m. (Ex. X, ¶ 13.)

10 An autopsy was performed on Kemp revealed that at least one puncture was made in
 11 the femoral area. (Private Autopsy Examination of Thomas Kemp, Declaration of Joseph I.
 12 Cohen, M.D., dated April 30, 2012, attached as Ex. Z.)⁷ The autopsy also revealed that there
 13 were at least two punctures in the left arm: one in the antecubital fossa and one in the outer
 14 forearm. (Ex. Z.) There were no puncture marks anywhere on his right arm. (Ex. Z.) Kemp
 15 had good veins that were quite prominent, without visible thickening, scarring, or sclerosis.
 16 (Ex. Z.) The autopsy revealed no visible signs of stroke, bleeding or other significant
 17 findings in the brain tissue. (Ex. Z.)

18 **D. Scheduled Execution of Samuel Lopez**

19 Samuel Lopez is scheduled to be executed at 10:00 a.m. on May 16, 2012. (Letter
 20 from Charles Ryan to the Arizona Supreme Court, dated April 16, 2012, Re: Execution of
 21 Samuel Lopez, attached as Ex. HH.) On April 20, 2012, Director Ryan informed Lopez that
 22 ADC will be using a one-drug protocol using pentobarbital to carry out his execution. (Letter
 23 from Charles Ryan to Samuel Villegas Lopez, Dated April 20, 2012, Re: Choice of Protocol,
 24 attached as Ex. II.) Lopez has no real assurance that ADC will in fact implement the January
 25 2012 Protocol as it has indicated, as ADC clearly is comfortable changing the protocol just

26
 27 ⁷A private autopsy was performed on April 28, 2012. The autopsy conducted by the
 28 Pima County Medical Examiner occurred on April 27, 2012. Counsel received photographs
 from the Medical Examiner's Office on May 1, 2012. Plaintiffs have not yet obtained the
 written autopsy report.

1 days before an execution. *See, e.g., Towerly*, 672 F.3d at 653 (noting that “after the appeal
 2 was filed and hours before the argument, Arizona yet again changed course as to its plans for
 3 the executions” and commenting that how the State failed to notice that its drugs were
 4 expired for “the past six weeks is beyond us, and gives us pause as to the regularity and
 5 reliability of Arizona’s protocols”).⁸

6 **III. This Court Should Grant Lopez a Preliminary Injunction**

7 Plaintiff Lopez seeks a preliminary injunction barring Defendants from executing him
 8 according to the January 2012 Protocol. *See* Fed. R. Civ. Proc. 65. The purpose of a
 9 preliminary injunction is to preserve the status quo until the rights of the parties can be fully
 10 and fairly litigated. *Los Angeles Mem. Coliseum Commission v. National Football League*,
 11 634 F.2d 1197, 1200 (9th Cir. 1980).

12
 13 ⁸Although ADC has not yet informed Lopez what drug protocol it intends to use in
 14 his execution, he has concerns about ADC’s ability to follow federal law in obtaining the
 15 drugs, much less in ADC’s ability to adhere to even its own stated drug choice.

16 First, ADC violated the federal Food, Drug, and Cosmetics Act when it imported three
 17 lethal-injection drugs into the country. *See Beaty v. FDA*, F.Supp.2d ___, 2012 WL 1021048,
 18 at *8 (D.D.C., March 27, 2012) (explaining that the federal Food, Drug, and Cosmetic Act
 19 (FDCA) “mandates the universal exclusion of foreign drugs from unregistered establishments
 20 that appear misbranded, adulterated, or unauthorized . . .” and finding that “the foreign
 21 manufactured thiopental . . . imported by the importing States (e.g., Arizona, California,
 22 South Carolina, Georgia, and Tennessee) is a misbranded drug and an unapproved new drug
 23 . . . as such, this thiopental cannot lawfully be . . . imported into the United States . . .”).
 24 Indeed, the court explained that “[t]he law does not create an exception for drugs purchased
 25 for use by a state DOC.” *Id.* at *10 n.9. (Although the court was only asked to address the
 26 issue of imported sodium thiopental, the court’s finding applies to all three drugs, because
 27 all three fall under the definition of “misbranded, adulterated, or unauthorized” drugs.)

28 Second, in addition to violating the FDCA, ADC violated the federal Controlled
 Substances Act by importing sodium thiopental without a license. Owing to the illegal
 importation, ADC has relinquished the thiopental to federal Drug Enforcement
 Administration agents.

With respect to ADC’s inability to follow its own stated notice, *see, e.g.,* [State’s]
 Notice of Substitution of Drug, *State v. Beaty*, Case No. CR-85-0211-AP/PC (Ariz. Sup. Ct.),
 filed May 24, 2011 (providing notice eighteen hours before Beaty’s execution that the
 Department will “substitute pentobarbital for sodium thiopental in carrying out the Donald
 Beaty execution.”); [State’s] Notice of Intent to Administer the One-Drug Protocol, filed
 jointly on February 27, 2012 in *State v. Moormann*, CR-12-0093-PC (Ariz. Sup. Ct.) and
State v. Towerly, CR-2-0493-AP (providing notice—two days before Moormann’s
 execution—of change in protocol because the Department “realized [today] that its
 foreign-supplied pancuronium bromide expired in January 2012.”); *see also Towerly v.*
Brewer, 672 F.3d at 653 (“How such a discovery escaped the State for the past six weeks is
 beyond us, and gives us pause as to the regularity and reliability of Arizona’s protocols.”).

Accordingly, absent court intervention, Lopez can have no confidence in statements
 made by ADC about the lethal-injection drugs.

1 “[A] preliminary injunction is appropriate when a plaintiff demonstrates that ‘serious
 2 questions going to the merits were raised and the balance of hardships tips sharply in the
 3 plaintiff’s favor.’” *Towery*, 672 F.3d at 657 (*quoting Alliance for the Wild Rockies v.*
 4 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). The four elements to consider when issuing
 5 a preliminary injunction are: (1) the likelihood of success on the merits of a claim; 2) the
 6 likelihood of suffering irreparable harm without preliminary relief; 3) whether the balance
 7 of equities tips in the movant’s favor; and 4) whether an injunction is in the public interest.
 8 *Id.* The Ninth Circuit has explained that “the elements of the preliminary injunction test are
 9 balanced, so that a stronger showing of one element may offset a weaker showing of
 10 another.” *Cottrell*, 632 F.3d at 1131. For the reasons outlined below, Lopez meets the
 11 standard for obtaining a preliminary injunction.

12 **A. The Merits of Lopez’s Claims**

13 Lopez has raised serious questions going to the merits of his claims. Lopez need not
 14 meet the preliminary injunction standard for every claim; a preliminary injunction is
 15 appropriate where he can demonstrate a likelihood of success on at least one of his claims.
 16 *See Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 983 (D. Ariz. 2006) (noting that the
 17 court need not address each and every claim in determining plaintiff’s likelihood of success
 18 on the merits where court has found at least one claim is likely to succeed). Lopez can meet
 19 the preliminary-injunction standard on the following claims:

20 **Defendants’ Failure to Provide Notice Violates Lopez’s Due-Process 21 Rights [Fourth Claim for Relief]**

22 “An elementary and fundamental requirement of due process in any proceeding which
 23 is to be accorded finality is notice reasonably calculated, under all the circumstances, to
 24 apprise interested parties of the pendency of the action and afford them an opportunity to
 25 present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314
 26 (1950). The January 2012 Protocol fails to provide reasonable notice of critical aspects of
 27
 28

1 the mode and manner in which Defendants will carry out executions.⁹

2 The January 2012 Protocol provides no notice whatsoever to condemned prisoners
3 about how ADC will gain intravenous access to administer the lethal drugs during an
4 execution. The January 2012 Protocol eliminates the requirement that peripheral IV access
5 be the default method, and gives the Director sole discretion to choose between peripheral
6 or central femoral IV access. (Dept. Order 710, Attach. D, § E (1).) The January 2012
7 Protocol also dispenses with any requirement that Defendants perform a pre-execution
8 assessment of the prisoner's veins to determine the best and safest access for each prisoner.
9 Having a qualified and experienced medically trained professional assess a prisoner's veins
10 is critical to minimize complications that could otherwise arise.

11 Placement of a central femoral line is an invasive, complicated surgical procedure that
12 is difficult to perform without significant training and experience. Errors in the attempted
13 placement of a femoral IV can result in severe pain, as well as serious complications. The
14 January 2012 Protocol fails to give Lopez any notice (let alone reasonable notice) of the
15 method of IV access that will be used in his execution. Moreover, Lopez is not provided any
16 information regarding the qualifications of the individuals inserting the IV catheters. The
17 January 2012 Protocol allows the Director to select individuals that he deems as
18 "appropriately trained." (Dept. Order 710.02, § 1.2.5.) Without such notice, Lopez is
19 prevented from challenging whether the method of IV placement to be used in his execution
20 presents a significant risk of serious harm, including whether it takes into account his
21 particular health concerns or whether a qualified medically trained individual is
22 available—critical components of a constitutional execution process.

23 This is of critical concern based on the circumstances surrounding the execution of
24 Robert Towery. ADC was unsuccessful at setting catheters in Towery's peripheral veins in
25

26 ⁹The January 2012 Protocol provides that the condemned prisoner shall be notified in
27 writing seven days before his execution which drug or drugs will be used in the execution.
28 *See* Dept. Order 710, Attach. D, § C, 1. While Lopez has been informed that Defendants
intend to execute him using a one-drug pentobarbital protocol, there is no guarantee that the
choice will not change before his execution. *See supra*, Section II.D.

his elbow area. Towery's veins, however, had no signs of scarring and were soft. (*See* ECF 54-1, Ex. W at 3.) The execution logs recorded by ADC indicate that the initial unsuccessful attempt to establish intravenous access took approximately 30 minutes and resulted in six punctures in either arm. (Ex. DD, Attach. 1 at 4.) And, despite at least two unsuccessful attempts to set a peripheral IV in Towery's left arm, the IV Team Leader directed that the left peripheral IV be used as a backup. (*Id.*) This calls into question the qualifications of the person making this decision. (Ex. AA, ¶ 7.) Compounding these problems, Towery was denied access to his attorney despite his request and his attorney's inquiries. (Ex. Y, ¶¶ 6, 12, 15, 16.)

During the execution of Thomas Kemp, ADC placed a femoral catheter in the right groin and a catheter in the left arm. (Ex Z; Ex. X, ¶ 10.) After saying three words during his last statement, Kemp appeared to be talking or moving his lips but witnesses could not hear anything. (Ex. X, ¶ 11.)

A prisoner's right to due process regarding the constitutionality of a given execution procedure must be a right of substance, rather than form. *Western Life Indemnity Co. of Ill. v. Rupp*, 235 U.S. 261, 273 (1914) (the Due Process clause "has regard not to matters of form, but to substance of right"). A state must disclose to a prisoner all relevant information relating to how it will carry out that prisoner's execution. By failing to provide notice of intended intravenous access for administering execution drugs and by preventing prisoners from accessing their counsel during this process, Defendants deprive Plaintiff Lopez of his right to notice and an opportunity to be heard, in violation of the Due Process Clause. *See Oken v. Sizer*, 321 F. Supp. 2d 658, 664 (D. Md. 2004) ("Fundamental fairness, if not due process, requires that the execution protocol that will regulate a prisoner's death be forwarded to him in prompt and timely fashion."), *stay vacated*, 542 U.S. 916 (2004).

The January 2012 Protocol Violates Lopez's Rights of Access to Counsel and the Courts [Fifth and Sixth Claims for Relief]

The right of access to the courts is protected by the Due Process and Equal Protection Clauses, *see Ex parte Hull*, 312 U.S. 546, 549 (1941); *Murray v. Giarratano*, 492 U.S. 1, 11

1 n. 6 (1989), and requires that prisoners be afforded “a reasonably adequate opportunity to
 2 present claimed violations of fundamental constitutional rights to the courts,” *Bounds v.*
 3 *Smith*, 430 U.S. 817, 825 (1977), *overruled in part on other grounds*, *Lewis v. Casey*, 518
 4 U.S. 343, 354 (1996). The fundamental rights during the hours before an execution includes
 5 the right to be competent during an execution and the right to be free from cruel and unusual
 6 punishment. Ensuring that those fundamental rights are not violated will only be proper if
 7 a prisoner has meaningful access to the courts, which means that he must have the
 8 opportunity to “communicate privately with an attorney.” *Ching v. Lewis*, 895 F.2d 608, 609
 9 (9th Cir. 1990); *Cooey v. Strickland*, Slip Copy, 2011 WL 320166, at *7 (S.D. Ohio Jan. 28,
 10 2011) (“[T]here is unquestionably a right to access the courts involved in the context of
 11 executions that inherently injects the issue of access to counsel.”).

12 With the new January 2012 Protocol and the Director’s actions under it, ADC has
 13 made it plain that it rejects the concept of a prisoner’s fundamental right of access to the
 14 courts. Contrary to ADC’s written policy for at least the past twenty-six years, *see supra* n.2,
 15 condemned prisoners are now prevented from meeting with their attorneys in the hours
 16 before an execution. *See* DO 710.11, §§ 1.5.1 and 1.5.2. Instead, only telephonic contact
 17 with attorneys will be permitted, which will take place in a holding cell in the presence of
 18 ADC officers with no opportunity for privileged communication.

19 Without the ability to have privileged communications in the immediacy of Lopez’s
 20 execution, Lopez can have no “meaningful” access to counsel and the courts. If
 21 circumstances arise immediately prior to Lopez’s execution that present constitutional
 22 concerns, due process demands that he have the means—through counsel—to petition the
 23 courts for appropriate relief. *Cooey v. Strickland*, 2011 WL 320166, at *10 (S.D. Ohio Jan.
 24 28, 2011) (“If Plaintiffs cannot communicate with counsel [on the day of execution], then
 25 this Court can hardly conclude as a matter of law that Plaintiffs have adequate, effective, and
 26 meaningful access to the courts.”).

27 In the modified protocol approved by the Ninth Circuit for Towery’s and Moormann’s
 28 executions, the prisoners were allowed to meet with their counsel from 7:15 a.m. until 9:15

1 a.m., which was consistent with prior protocols. *See Towery*, 672 F.3d at 658 (noting that
 2 Moormann and Towery shall be allowed to meet with counsel consistent with “long-standing
 3 ADC practice” under prior protocol, which allowed legal visit up until 45 minutes before
 4 scheduled execution). This is no longer the case with Lopez, as there is no court order
 5 requiring the ADC to comply with prior procedures.¹⁰

6 Moreover, it is imperative that Lopez also be permitted access to counsel, and in turn
 7 the courts, during the insertion of the IV catheters. During Towery’s execution, Towery
 8 asked to meet with counsel during the extended period that the IV team was repeatedly
 9 puncturing Towery in an attempt to set peripheral IVs. (Ex. Y, ¶¶ 12, 15-17.) Although it
 10 seems likely that Towery wished to consult with counsel about the repeated failures, it is also
 11 possible that Towery had other concerns that he needed to address with counsel. Moreover,
 12 Towery’s counsel attempted to obtain information about the execution delay, but was
 13 rebuffed. (Ex. Y, ¶ 6.) Defendants cannot be permitted to deny prisoners the right to litigate
 14 viable claims of constitutional violations by preventing them from accessing counsel and the
 15 courts, and then executing them.

16 In evaluating a claim of denial of meaningful access to the court, a court must
 17 “weigh[] the interests of the prison as an institution (in such matters as security and effective
 18 operation) with the constitutional rights retained by the inmates.” *Cooey*, 2011 WL 320166,
 19 at *9 (internal citation and quotation omitted); *see also Ching*, 895 F.2d at 610 (holding that
 20 a prisoner must be permitted attorney visitation absent justification from prison). Policies
 21 that unnecessarily obstruct the availability of professional representation—like unreasonably
 22 restricting attorney visitation and communication—will be invalid. *See Johnson by Johnson*
 23 *v. Brelje*, 701 F.2d 1201, 1207-08 (7th Cir. 1983) (prison’s telephone policy
 24 unconstitutional); *Cooey*, 2011 WL 320166, at *9 (execution protocol that limited attorney
 25 contact on the morning of an execution unconstitutional).

26
 27 ¹⁰Based on ADC’s position with regard to Thomas Kemp, Lopez has no reason to
 28 believe that he will be permitted access to his attorneys consistent with the Ninth Circuit’s
 opinion in *Towery*. *See* Ex. X; ECF No. 54-1, Ex. U; Ex. JJ.

Here, before implementing the January 2012 Protocol, Defendants permitted the last twenty-eight executed prisoners to have in-person visitation with their attorneys on the day of their execution. Defendants have no legitimate governmental interest in this sudden about-face. The January 2012 Protocol on its face obstructs Lopez's ability to communicate with counsel in what may be the final hours of his life, thus stripping away one of his most sacred rights under the Constitution. *See DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988) ("A prison inmate's right of access to the courts is the most fundamental right he or she holds. 'All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.'" (quoting *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973))). Moreover, the January 2012 Protocol, as applied, has resulted in the Director abusing his discretion by denying a prisoner access to his counsel when he asked for counsel. Defendants' actions cannot continue.

**Execution by the January 2012 Protocol As Written and As Applied
Would Violate Lopez's 14th Amendment Rights to Equal Protection
Under the Laws [Second and Third Claim for Relief]**

On its face and as applied, the January 2012 Protocol violates Lopez's right to equal protection under the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. The January 2012 Protocol, which removes the Eighth Amendment safeguards, burdens the fundamental rights of Lopez without a compelling state interest.

A. The January 2012 Protocol removes necessary safeguards without adequate justification

Defendants must justify removing several important safeguards from the execution protocol in order to obtain constitutional sanction of that protocol, as they did when they adopted safeguards to obtain a favorable ruling in the *Dickens* litigation. This they have not done. Instead, they have simply substantially reduced the safety of their execution protocol by removing many of the very safeguards they adopted to obtain this favorable ruling. *See Perry v. Brown*, 671 F.3d 1052, 1083-84 (9th Cir. 2012) ("[T]he Equal Protection Clause requires the state have legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first

place.”) (emphasis omitted). As with any other state action, Defendants must establish a legitimate basis for retreating from increased protections once those protections have been adopted. *See e.g., Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 535 (1982) (state may repeal legislation adding rights that go beyond constitutional requirements for legitimate purposes); *Perry*, 371 F.3d at 1092 (“Laws may be repealed and new rights taken away if they have had unintended consequences or if there is some conceivable affirmative good that revocation would produce, but new rights may not be stripped away solely because they are new.”) (internal citations omitted). This is all the more true when, as here, Defendants adopted these protections *specifically* to obtain a favorable ruling. The only interest that Defendants are furthering is their interest in eliminating time-consuming yet crucial safety measures by increasing the Director’s discretion and thereby reducing the likelihood that they will deviate from a nearly standardless protocol. Defendants’ inability to comply with their own execution standards is not a legitimate basis for removing those standards. *See, e.g., Bush v. Gore*, 531 U.S. 98, 103 (2000) (“A desire for speed is not a general excuse for ignoring equal protection guarantees.”); *Rinaldi*, 384 U.S. at 310 (administrative convenience is insufficient justification for disparate treatment when alternatives are readily available). Here, alternatives are available: ADC itself incorporated them in the previous protocol. Not only is ADC aware of alternatives, but it authored them. Now, however, ADC has stripped these protections and asks this Court to sanction its standardless, risk-enhancing protocol.

B. The disparate treatment under the January 2012 Protocol as applied burdens Lopez’s fundamental rights

The disparate treatment under the January 2012 Protocol violates the Fourteenth Amendment by burdening Lopez’s fundamental rights, thereby triggering heightened strict-scrutiny analysis. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1310 (9th Cir. 1982). The Ninth Circuit recently rejected the district court’s conclusion that if there is no Eighth Amendment violation then that necessarily means that there has been no interference with fundamental rights to trigger strict scrutiny. *See*

1 *Towery*, 672 F.3d at 659. Instead, the Ninth Circuit recognized that there could be an equal-
 2 protection violation where a prisoner demonstrates that state actions *burden* his fundamental
 3 rights. *Id.* at 660. Relying upon a federal court’s analysis in Ohio, the court found that a
 4 burden on a fundamental right could be shown through a “pattern of treating prisoners
 5 differently in ways that [] affect[ed] the *risk* of pain to which they would be subjected.”
 6 *Towery*, 672 F.3d at 660 (citing *In re Ohio Execution Protocol Litig.*, __ F. Supp. 2d __,
 7 2012 WL 84548, at *9 (S.D. Ohio Jan. 11, 2012)).¹¹

8 Here, Lopez demonstrates that Defendants have burdened his fundamental right to be
 9 free from cruel and unusual punishment.¹² Defendants must therefore establish that a
 10 compelling state interest supports removing necessary safeguards from the execution protocol
 11 in favor of an arbitrary approach that allows execution styles ranging widely in risk and pain
 12 inflicted. *See Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010); *United States v. Alvarez*,
 13 617 F.3d 1198, 1216 (2010); *see also Bush*, 531 U.S. at 103, 105-106 (finding voting
 14 procedures lacking sufficient standards to guard against non-arbitrary treatment violate the
 15 Equal Protection Clause). Defendants furthermore bear the burden of demonstrating that this
 16 unbridled discretion and these decreased safeguards are necessary to—or are the least
 17 restrictive means for—achieving a compelling state interest. *See Citizens United*, 130 S.Ct
 18 at 898. They cannot meet their burden.

19 Defendants have not only removed many of the safeguards from ADC’s protocol that
 20 _____

21 ¹¹The district court rebuked Ohio for its “dubious cycle of defending often
 22 indefensible conduct, subsequently reforming its protocol when called on that conduct, and
 23 then failing to follow through on its own reforms.” *In re Ohio Execution Protocol Litig.*, __
 24 F. Supp. 2d __, 2012 WL 84548, at *1 (S.D. Ohio Jan. 11, 2012). The court found that the
 25 plaintiff was likely to succeed on his claim that Ohio’s execution protocol “is facially invalid
 26 because it codifies disparate treatment of similarly situated individuals without sufficient
 27 justification so as to be arbitrary, irrational, and capricious.” *Id.* at *3. The Sixth Circuit
 affirmed, and the Supreme Court did not vacate the stay. *Kasich v. Lorraine*, 131 S. Ct. 1306
 (2012) (Mem.) (refusing to vacate district court’s grant of temporary restraining order for
 Charles Lorraine based on equal-protection claim where the state had repeatedly failed to
 adhere to execution protocols); *In re Ohio Execution Protocol Litig.*, 671 F.3d 601(6th Cir.
 2012) (same). Like the unconstitutional protocol, the January 2012 Protocol also codifies
 disparate treatment absent sufficient justification.

28 ¹²Lopez can also demonstrate that Defendants’ disparate treatment will burden his
 right to access the courts.

1 were put into place *for the express purpose of complying with the Eighth Amendment*, but
2 they have allowed the Director unfettered discretion in conducting an execution. Unlike the
3 petitioners in *Towery*, Lopez can demonstrate a “pattern of treating prisoners differently in
4 ways that [] affect[ed] the *risk* of pain to which they would be subjected.” *Towery*, 672 F.3d
5 at 660 (citation omitted). Specifically, each of the three prisoners that have been executed
6 since the adoption of the January 2012 Protocol have been treated differently.

7 Moormann had one peripheral IV placed in each arm, and it took the IV team ten
8 minutes to set the lines.

9 In contrast, it took the IV team over an hour to set the IV lines for Towery. There
10 were at least six punctures made to Towery’s arms over a half-hour period. Despite the
11 team’s inability to set a peripheral IV in either arm, the IV team leader recommended using
12 a peripheral IV in the arm as the backup line for Towery while recommending a femoral IV
13 as the primary line. It was not until another twenty minutes ostensibly of additional
14 unsuccessful attempts that it was determined that the backup catheter should be placed in
15 Towery’s right hand. This decision was made even though the doctor who Director Ryan
16 hired to conduct executions in 2010-2011 said that there would be pain and discomfort if
17 drugs were administered through a vein in the hand.

18 Kemp had a femoral IV and an IV in his left arm at his elbow. There were no
19 attempts to place a peripheral IV in Kemp’s right arm, and there was at least one more
20 puncture would in Kemp’s left forearm.

21 Defendants have no compelling reason for treating prisoners differently. There was
22 no pre-execution individualized assessment to determine which veins should be accessed.
23 To the contrary, during Towery’s execution, Defendants were unable to set peripheral IV
24 lines. In light of Towery’s good veins, there are serious questions regarding the
25 qualifications of the person(s) attempting to set the lines. Moreover, even if numerous
26 attempts to set peripheral lines were reasonable, once the IV team was unsuccessful, it was
27 unreasonable to designate the left arm peripheral IV as a backup line. When the backup
28 option failed—which was not unusual given that the IV team could not establish the line in

1 the first thirty minutes—Defendants blatantly disregarded the known potential of Towery’s
 2 suffering. Ultimately, by designating Towery’s right wrist as the backup catheter, the
 3 Director ignored the advice of the doctor who participated in the five executions in 2010-
 4 2011.¹³

5 Because Defendants can offer no compelling justification for disposing of these
 6 necessary safeguards and treating prisoners differently, the January 2012 Protocol as written
 7 and as applied is invalid. *See Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131
 8 S. Ct. 2806, 2826 (2011); *Cooley*, 801 F. Supp. 2d 623, 653 (S.D. Ohio 2011) (rejecting
 9 deviations in Ohio’s execution procedures because defendants offered “no compelling reason
 10 for selectively introducing risk into some executions but not others”).

11 **The January 2012 Protocol, Both Written and Applied, Violates the**
 12 **Eighth Amendment [First Claim for Relief]**

13 Lopez’s Eighth Amendment challenge raises concerns outside of *Baze v. Rees*, 553
 14 U.S. 35 (2008), which only considered the risk of pain under a three-drug protocol. Because
 15 Defendants intend to use a one-drug protocol in executing Lopez, this Court should consider
 16 whether he can demonstrate, based on Defendants’ past actions, that the medical procedure
 17 of inserting the IV catheters violates his Eighth Amendment rights. In deciding this claim,
 18 the Court should apply the standard that there is “an ‘objectively intolerable risk of harm’
 19 that prevents prison officials from pleading that they were ‘subjectively blameless for
 20 purposes of the Eighth Amendment.’” *See, e.g., Baze*, 553 U.S. at 50 (*quoting Farmer v.*
 21 *Brennan*, 511 U.S. 825, 842, 846, n.9 (1994)). Here, Lopez can demonstrate that
 22 Defendants’ actions have created an objectively intolerable risk of harm for which they
 23 cannot be subjectively blameless.

24 Of critical importance to Lopez’s Eighth Amendment claim are Defendants’ actions
 25 surrounding the medical procedure of inserting IV catheters in condemned prisoners.

26 ¹³While MTL testified during his 2011 deposition that he did not intend to participate
 27 in future executions (*West v. Brewer*, No. 2:11-cv-01409, Deposition of Medical Team
 28 Leader, October, 24, 2011, ECF No. 104, Ex. 265 at 293-94), Lopez does not know whether
 MTL has participated in the 2012 executions because Defendants refuse to provide that
 information.

1 Defendants have a history of retaining unqualified individuals to conduct this procedure.
2 *See, e.g., Dickens*, 631 F.3d at 1142; *West*, 2011 WL 6724628, at *6. Moreover, the facts
3 surrounding the most recent executions demonstrate that Defendants are not subjectively
4 blameless for the risk of harm they cause to prisoners. Instead, through their actions,
5 Defendants have chosen to ignore the advice of their own retained physician regarding the
6 harm. Rather than being blameless, Defendants are directly responsible for the harm.

7 During Towery's execution, ADC elected to first designate as the backup IV site a
8 location for which the IV team unsuccessfully attempted to gain access for approximately
9 one-half hour; then ADC elected to use a backup IV site in an area that ADC's own doctor
10 who performed the 2010-2011 executions indicated would cause pain and discomfort. In
11 Kemp's execution, ADC placed a femoral IV line without even attempting to set a catheter
12 in Kemp's right arm. As discussed *supra*, the insertion of a femoral line by an unqualified
13 individual increases the risk of pain and suffering. Because these actions demonstrate an
14 Eighth Amendment violation, Lopez has shown a likelihood of success on the merits of this
15 claim.

16 Defendants have fostered an execution environment which does not provide the basic
17 safeguards that the Constitution demands. Instead of a rigorous protocol that attempts to
18 meet the minimum protections the *Baze* safeguards guarantee, Defendants have designed a
19 protocol that permits unfettered discretion at the very points where *Baze* sought to limit the
20 potential for error through thorough safeguards. The result is a protocol that is a protocol
21 in name only. It provides the illusion of regulated procedure while permitting unqualified
22 and untrained individuals to perform demanding tasks at the whim of the Director. This is
23 outside the constitutional framework constructed in *Baze*.

24 **B. Lopez is Likely to Suffer Irreparable Harm**

25 As a matter of law, Lopez will suffer irreparable harm if a preliminary injunction is
26 not granted. *See Towery*, 672 F.3d at 661 (recognizing that irreparable harm is demonstrated
27 by prisoners bringing § 1983 lawsuit involving upcoming execution). As described above,
28 Lopez has raised colorable claim of threatened constitutional violations of his First, Fifth,

1 Eighth, and Fourteenth Amendment rights under the United States Constitution. The Ninth
 2 Circuit has made clear that “[a]n alleged constitutional infringement will often alone
 3 constitute irreparable harm.” *Goldie’s Bookstore Inc. v. Super. Ct. of Calif.*, 739 F.2d 466,
 4 472 (9th Cir. 1984); *see also, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 1001-1002 (9th
 5 Cir. 2005) (“‘When an alleged deprivation of a constitutional right is involved, most courts
 6 hold that no further showing of irreparable injury is necessary’”) (*citing* 11A Charles Alan
 7 Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2948.1 (2d
 8 ed. 2011)).

9 Lopez will also suffer irreparable harm as a matter of fact. He is scheduled to be
 10 executed on May 16. If executed under the January 2012 Protocol and at the whims of the
 11 Director, he will be denied Equal Protection and due process under the law, as demonstrated
 12 by the very face of the Protocol. And without many of the constitutional safeguards
 13 mandated by *Baze*, there is a substantial risk that Lopez will experience pain and suffering.

14 Finally, Lopez does not seek damages; no amount of monetary relief could adequately
 15 compensate him once he is executed in violation of the Constitution. *See Monterey*
 16 *Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (constitutional violations cannot
 17 be remedied through damages). There is nothing more final and irreversible than death. If
 18 Lopez is unconstitutionally executed, the harm is irreparable. Once this violation occurs, he
 19 will have no recourse for an execution that violates his constitutional rights.

20 **C. The Balance of Equities Favors Lopez**

21 The balance of equities tips sharply in Lopez’s favor. This Court should keep in mind
 22 that Lopez is not seeking an injunction to forever prevent the State from carrying out his
 23 sentence. Rather, he seeks only to enjoin Defendants from executing him in an
 24 unconstitutional manner. While “the State has a significant interest in enforcing its criminal
 25 judgments, it is unclear how a short, temporary stay to resolve [Lopez’s] claims will threaten
 26 that interest.” *Landrigan v. Brewer*, No. CV-10-02246, 2010 WL 4269559, *11 (D. Ariz.,
 27 Oct. 25, 2010) (internal citation omitted).

28 This Court should not permit executions to proceed before it has the opportunity to

1 review Lopez’s claims regarding the newly-issued January 2012 Protocol. He is not merely
 2 speculating about the harm that might occur as a result of Defendants’ new protocol: he is
 3 alleging that the January 2012 Protocol is *facially* unconstitutional. Lopez has raised serious
 4 questions going to the merits of his claims and the hardships to be suffered by Lopez
 5 outweighs the limited hardships of Defendants. The delay resulting from granting the relief
 6 sought here will have little adverse effect on the State’s interest and will ensure that ADC
 7 does not perform an unconstitutional execution. *See Gomez v. U.S. Dist. Ct. For N. Dist. of*
 8 *Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J. dissenting from grant of writ of mandate)
 9 (“The state will get its man in the end. In contrast, if persons are put to death in a manner
 10 that is determined to be cruel, they suffer injury that can never be undone, and the
 11 Constitution suffers an injury that can never be repaired.”).

12 **D. Granting the Injunction Would Serve the Public Interest**

13 Preliminary relief would serve the public interest because “all citizens have a stake
 14 in upholding the Constitution” and have “concerns [that] are implicated when a constitutional
 15 right has been violated.” *Preminger v. Principi*, 422 F.3d, 815, 826 (9th Cir. 2005). The
 16 “public interest is served only by enforcing constitutional rights and by the prompt and
 17 accurate resolution of disputes concerning those constitutional rights.” *In re Ohio Execution*
 18 *Protocol Litigation*, 2012 WL 84548, *14 (citation omitted). Indeed, “the public interest has
 19 never been and could never be served by rushing to judgment at the expense of a condemned
 20 inmate’s constitutional rights.” *Id.* Surely, it is in the public interest to carry out executions
 21 in a safe manner. Under the constitution and *Baze*, safeguards must be in place to minimize
 22 the risk of pain that the prisoner may suffer. Here, the public interest is harmed as the ADC,
 23 by giving unfettered discretion to its Director, has demonstrated that it cannot comply with
 24 the tenets of the Constitution. The lack of transparency and the failure to follow a written
 25 set of reliable procedures erodes confidence in the public officials who are charged with
 26 carrying out executions in Arizona. The citizens of Arizona deserve more and the public
 27 interest tilts toward Lopez here. The public interest will also be served because Arizona will
 28 continue to conduct executions unconstitutionally unless forced by this Court to make

1 necessary changes. Moreover, there is no public interest that would be injured by the
2 granting of preliminary relief. *Cottrell*, 632 F.3d at 1138 (considering “whether there exists
3 some critical public interest that would be injured by the grant of preliminary relief”).

4 **IV. Plaintiffs Have Not Intentionally Delayed in Filing their Lawsuit and Could Not**
5 **Have Raised their Claims Sooner**

6 Before granting injunctive relief that would prevent an execution from occurring,
7 courts must “consider not only the likelihood of success on the merits and the relative harms
8 to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing
9 the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). There has been no such delay
10 here.

11 Lopez, along with the other Plaintiffs, filed a motion for leave to file a second
12 amended complaint on April 2, 2012. (ECF No. 53.) This motion was filed as soon as
13 practicable after Plaintiffs obtained additional facts necessary to amend the complaint. In
14 particular, the factual basis for Plaintiffs’ amended complaint did not come to light until after
15 Plaintiffs received autopsy reports and execution logs for Moormann’s execution (February
16 29, 2012), and Towery’s execution (March 8, 2012). Defendants provided copies of
17 execution logs on March 23, 2012. The private autopsy report for Towery was not provided
18 to Plaintiffs until April 2, 2012. (ECF No. 54-1, Ex. W at 6.) On April 19, 2012, this Court
19 granted the motion for leave to file a second amended complaint. (ECF No. 57.) Lopez
20 could not assert the basis for his preliminary injunction motion until the second amended
21 complaint was filed.

22 Moreover, Kemp’s execution occurred on April 25, 2012. The facts surrounding the
23 circumstances of his execution were only recently revealed with the private autopsy of Kemp,
24 which occurred on April 28, 2012. (*See Ex Z.*) Joseph Cohen, M.D., who performed the
25 autopsy of Kemp, provided a declaration outlining his preliminary findings at the end of day
26 on April 30, 2012. (*See Ex Z.*) Lopez could not have discovered these facts sooner.

27 Because the imminent execution of Samuel Lopez under the newly-released and
28 substantially revised January 2012 Protocol would violate his constitutional rights, he is

entitled to injunctive relief.

V. Conclusion

For the reasons outlined in this Memorandum, this Court should:

- (1) grant Lopez a preliminary injunction preventing Defendants from carrying out his execution on the scheduled date;
- (2) grant Lopez a preliminary injunction requiring Defendants to allow attorney visitation up to at least forty-five minutes before the time of his scheduled execution;
- (3) grant Lopez a preliminary injunction requiring Defendants to allow Lopez's attorney to be present during the insertion of IV catheters;
- (4) grant Lopez oral argument and an evidentiary hearing on his request for a preliminary injunction; and
- (5) grant any other relief as this Court deems appropriate.

Respectfully submitted this 1st day of May, 2012.

Jon M. Sands
Federal Public Defender
Dale A. Baich
Robin C. Konrad
Cary Sandman

David J. Sepanik
Flora F. Vigo
Amanda R. Conley
O'Melveny & Myers LLP

By: s/Dale A. Baich
Counsel for Plaintiffs Rogovich,
Stanley, Cook, and Stokley

Kelley J. Henry
Denise I. Young

By: s/Kelley J. Henry (with permission)
Counsel for Plaintiff Lopez

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Certificate of Service

I hereby certify that on May 1, 2012, I electronically transmitted the foregoing Motion by Plaintiff Samuel Lopez for Preliminary Injunction to the Clerk's office using the CM/ECF System for filing.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Michelle Young
Legal Assistant
Capital Habeas Unit

Towery v. Brewer
No. 2:12-cv-00245-NVW

Exhibits to Motion by Plaintiff Samuel Lopez for Preliminary Injunction

- X. Declaration of Timothy M. Gabrielsen, dated April 30, 2012
- Y. Declaration of Dale A. Baich, dated April 30, 2012
- Z. Private Autopsy Examination of Thomas Kemp, Declaration of Joseph I. Cohen, M.D., dated April 30, 2012
- AA. Declaration of Eric D. Katz, M.D., dated April 30, 2012
- BB. Excerpt Transcript Testimony of Eric Katz, M.D., pp. 19-25, *West v. Brewer*, No. 2:11-cv-01409 (D. Ariz.), December 7, 2011
- CC. Excerpt Transcript Testimony of Medical Team Leader, pp. 32-33, *West v. Brewer*, No. 2:11-cv-01409 (D. Ariz.), December 6, 2011
- DD. Declaration of Angela Fairchild, dated April 30, 2012
 - 1. ADC Correctional Service Log, Housing Unit 9 Section Leader, dated March 8, 2012
 - 2. ADC Correctional Service Log, Housing Unit 9 Special Operations, dated March 8, 2012
 - 3. Execution Log, Towery, ADC #051550
 - 4. ADC Correctional Service Log, Housing Unit 9 Section Leader, dated February 29, 2012
 - 5. ADC Correctional Service Log, Housing Unit 9 Special Operations, dated February 29, 2012
 - 6. Execution Log, Moormann, ADC # 31293
- EE. Letter from Charles Ryan to the Arizona Supreme Court, dated February 9, 2012, Re: Execution of Robert Moormann

- FF. Letter from Charles Ryan to the Arizona Supreme Court, dated February 17, 2012, Re: Execution of Robert Towery
- GG. Letter from Charles Ryan to the Arizona Supreme Court, dated March 28, 2012, Re: Execution of Thomas Kemp
- HH. Letter from Charles Ryan to the Arizona Supreme Court, dated April 16, 2012, Re: Execution of Samuel Lopez
- II. Letter from Charles Ryan to Samuel Villegas Lopez, dated April 20, 2012, Re: Choice of Protocol
- JJ. Letter from Charles Ryan to Dale Baich, dated April 2, 2012, Re: Attorney Visitation

EXHIBIT X

EXHIBIT X

Declaration of Timothy M. Gabrielsen

I, Timothy M. Gabrielsen, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an Assistant Federal Public Defender with the Office of the Federal Public Defender in the Capital Habeas Unit. I represent indigent prisoners sentenced to death.
2. I was one of the attorneys who represented Thomas Kemp. I was also one of the individuals whom Mr. Kemp listed to be a witness to his execution on April 25, 2012.
3. On the morning of Mr. Kemp's execution, I met with Mr. Kemp from approximately 6:00 a.m. until 7:00 a.m. at the prison in Florence, Arizona. I then left the prison grounds.
4. I returned to the prison at 8 a.m., with another, to be admitted to witness Mr. Kemp's execution, which was set for 10 a.m. Arizona Department of Corrections personnel, two women, led us to two buildings prior to taking us to Housing Unit 9, which is where the execution was to occur. We remained at the first building for approximately one hour.
5. The two female ADOC staff then moved us to another nearby building. A different woman with the ADOC entered the room and said that she was going to read us a protocol for the execution. The ADOC official appeared to be reading from a piece of paper she was holding. As best I can recall, she reported that Mr. Kemp would be sedated and that after it was verified that he was sedated, the lethal drugs, or a similar description of the drugs, would be injected.
6. Her statement raised a concern because ADOC Director Charles Ryan had provided written notice to Mr. Kemp that ADOC would carry out his execution using a one-drug protocol. If that were true, I thought, there would be no need for the administration of additional drugs once Mr. Kemp was deemed sedated.

7. I interrupted the woman and said that the protocol sounded like the ADOC was going to execute Mr. Kemp with a three-drug protocol, which conflicted with the Director's notice. She paused briefly but failed to answer my concern. She resumed reading from the protocol. When she left the room in which I was seated, she returned to the hallway where it sounded like she told one or more ADOC personnel that a question had been raised during her reading of the protocol.
8. The original two escorts then took me and the other witness toward the execution chamber. I told one of those women that I needed clarification as to how the ADOC planned to kill Mr. Kemp, with a single drug or three drugs. She said that there was a man at the execution area who could answer that question.
9. At the door to the Housing Unit 9 there was a man in a suit or sport coat and tie. I stated that the protocol that was just read to me seemed to indicate that multiple drugs would be used for the execution but that the Director had informed Mr. Kemp in writing that one drug would be used. I asked him to clarify which method would be used. The man informed me that ADOC would be using one drug to execute Mr. Kemp.
10. I witnessed the execution of Mr. Kemp. From the witness room it appeared that Mr. Kemp had a femoral line in his groin. I saw a tray with sheet draped over his groin. I did not see a catheter in his outstretched right arm. I saw a light colored material around his right wrist and something resembling a cowhide strap over it that tethered his wrist to the gurney or table upon which the execution was taking place. I saw what appeared to be black straps across Mr. Kemp's chest against what appeared to be an orange shirt or jumpsuit. I do not recall seeing a sheet, blanket or other covering over his chest.
11. Mr. Kemp made a last statement. He said, "I regret nothing." It appeared that he tried to talk or at least move his lips after that, but I could not hear anything.

//

12. Soon after the lethal injection process started, Mr. Kemp's torso and right arm shook for approximately five or six seconds. I would characterize the shaking as violent due to the strain I saw being exerted on the cowhide strap on his right wrist and his right forearm moving repeatedly and quickly up and down off the gurney. It appeared as though he were convulsing or seizing. It is my recollection that his eyes were closed while he convulsed or shook and that his eyes did not open afterwards.
13. Mr. Kemp was pronounced dead at 10:08 a.m.

Signed this 30th day of April 2012, in Tucson, Arizona.



Tim Gabrielsen

EXHIBIT Y

EXHIBIT Y

Declaration of Dale A. Baich

I, Dale A. Baich, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an Assistant Federal Public Defender with the Office of the Federal Public Defender in the Capital Habeas Unit.
2. I was one of the attorneys who represented Robert Towery. I was also one of the individuals that Mr. Towery listed to be a witnesses to his execution on March 8, 2012. The execution was scheduled to begin at 10:00 a.m.
3. On the morning of Mr. Towery's execution, I, along with attorney Therese Day, met with Mr. Towery at about 8:15a.m. in Housing Unit 9 in the Central Unit at the Arizona State Prison in Florence. We were promptly escorted from Housing Unit 9 at 9:15 a.m.
4. I was then escorted by Arizona Department of Corrections (ADC) officers to a different building within Central Unit and taken to a conference room where I waited with other witnesses.
5. At approximately 9:40 a.m., I, along with the other witnesses, were moved from the conference room to another building at Central Unit and placed in an office.
6. At approximately 10:45 a.m., I was still waiting to be escorted into the witness area of Housing Unit 9. I thought this was unusual because on February 29, 2012, I witnessed the execution of Robert Moormann and the witnesses were escorted to Housing Unit 9 at approximately 10:10 a.m. I asked one of the ADC escort officials if there was a problem and if there was anything to report regarding Mr. Towery or the execution procedure. The escort officer indicated that she would check with the command center. After checking with the command center, the escort officer informed me that command had nothing to report.
7. I then asked to use the telephone. At approximately 10:50 a.m., I spoke with attorneys at the Office of the Federal Public Defender and informed them that


I was concerned that the execution had not started.

8. At approximately 11:03 a.m., I reported to the attorneys at my office that I, along with the other witnesses, were being moved to Housing Unit 9.
9. I arrived at Housing Unit 9 at approximately 11:08 a.m.
10. At approximately 11:17 a.m., Mr. Towery gave his last statement.
11. The evening prior to his execution, I had informed Mr. Towery what he could expect when ADC placed the intravenous (IV) catheters. Mr. Towery then made fists with both hands to show me the veins in each of his arms. He said "With veins like these, how can they miss."
12. I advised Mr. Towery that if there were any problems with the procedure or if he had concerns with what was occurring as the IV lines were being inserted, that he should advise the ADC officials who were present in the execution chamber that he wished to speak to his attorney. I further told Mr. Towery if the ADC officials would not allow him to speak with his attorney that he should say words to that effect as part of his last statement.
13. Mr. Towery was concerned about speaking openly about the procedures, as he had been informed by ADC that his last words would be cut off if he made any statements against ADC.
14. This concern is consistent with what Richard Bible told me during a morning meeting I had with him on the day of his execution. The date was June 30, 2011. Mr. Bible said that he was told by an ADC official to keep his last statement short, and that if he was critical of the ADC, critical of law enforcement or made disparaging comments about the victim, the microphone would be cut off during his statement. Mr. Bible was also told he would have to rehearse his last statement with an ADC official.
15. Mr. Towery said that rather than directly state that he asked to talk to his lawyer during the IV insertion procedure, he would say something to the effect of "Hey Dale I should have called you." He also said that if there were problems with the insertion of the IV lines or that if he was being hurt, he

would use the word “mistake” as part of his last statement.

16. During Mr. Towery’s last words, he said “In the end, I should have called you Dale.” Based on my discussions with Mr. Towery, this phrase meant that he asked to have speak to his lawyers while the catheters were being placed but was denied access.
17. During Mr. Towery’s last words, he also said that he should have gone left and he went right. He went right when he should have gone left. He then went on to say he made “mistake, after mistake after mistake.” Based on my discussions with Mr. Towery, this phrase meant that there were problems or he was hurt during the insertion of the catheters.
18. From the witness room, it appeared that Mr. Towery had a catheter in his right leg and a catheter in his right wrist.

Signed this 30th day of April 2012, in Phoenix, Arizona.



Dale A. Baich

EXHIBIT Z

EXHIBIT Z

United Forensic Services, P.C.
Professional Forensic Autopsy & Consultation

Joseph I. Cohen, M.D., Forensic Pathologist | drcohen@forensiconline.com | www.forensiconline.com
448 Ignacio Blvd., Suite 325, Novato, California 94949 | 877.372.6436 Toll Free | 951.346.3245 Fax

Private Autopsy Examination of Thomas Kemp
(Declaration of Joseph I. Cohen, M.D.)

I, Joseph I. Cohen, M.D., Forensic Pathologist, performed a private autopsy examination, following the informed written consent of the Federal Public Defender, on the previously autopsied body of Thomas Kemp on April 28, 2012, at the University of Arizona Medical Center in Tucson, Arizona.

The following declaration serves as a preliminary summary of my autopsy findings, and is not intended to provide the detail that will be reported in my forthcoming, final autopsy protocol. I respectfully reserve the right to alter the following opinions in the event that additional pertinent information becomes available through future discovery or scientific studies.

Mr. Kemp was a well-developed, well-nourished man who, by history, was executed by lethal injection. An initial autopsy examination was performed by the local medical examiner.

Lethal injection was most likely performed via right femoral and/or left upper extremity venous (intravascular) access. Evidence of at least three or more antemortem punctures, including at least one puncture in the right femoral area and at least two punctures over the left upper extremity (left antecubital and lateral left forearm regions), were observed during the course of my autopsy examination.

The initial autopsy examination, performed by the medical examiner, included the performance of incisions and dissection over the right femoral and left antecubital areas. The incisions in these areas were extended by the undersigned during the course of this private autopsy examination. Additionally, an incision with examination of subcutaneous tissue was performed by the undersigned, over the externally visible antemortem left forearm puncture. The presence of hemorrhage on the skin surface and within the subcutaneous tissues corresponding to the left forearm puncture, confirms the antemortem nature of the left forearm puncture.

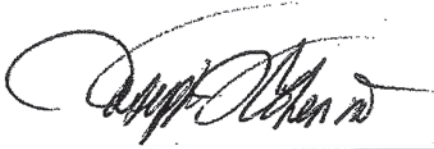
There were no readily visible antemortem skin punctures over the right upper extremity and the feet of Mr. Kemp.

The veins of Mr. Kemp's extremities were routinely noted to be thin, delicate and translucent, without apparent vessel wall thickening or sclerosis. The veins of the feet were especially prominent, of relatively large diameter.

The examination performed by the undersigned failed to reveal significant underlying natural disease, and failed to reveal evidence of underlying acute or remote cerebrovascular (brain) disease or injury. Natural disease did not cause or contribute to the death of Mr. Kemp.

Thomas Kemp

Physical injury did not cause or contribute to the death of Mr. Kemp.



Joseph I. Cohen, M.D.
Forensic Pathologist

04-30-12

Date

EXHIBIT AA

EXHIBIT AA

Declaration of Eric D. Katz, M.D.

I, Eric D. Katz, M.D., declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am employed by the Maricopa Medical Center. At Maricopa Medical Center, I serve in the Department of Emergency Medicine as the Program Director and Staff Physician; the Vice-Chairman for Education; and the Associate Director, Simulation and Education Fellowship. I serve in the Department of Internal Medicine as a staff physician. At the University of Arizona College Medicine, I hold an appointment as Associate Professor of Emergency Medicine.
2. On December 7, 2011, I testified during the *West v. Brewer* trial in my capacity as an emergency-medicine expert.
3. During my testimony, I testified as to my qualifications, and I was qualified as a medical expert.
4. I have reviewed the execution log from the execution of Robert Towery, dated March 8, 2012, titled "Correctional Service Log," by the Housing Unit 9 Section Leader.
5. That log indicates that when the execution team was attempting to set IV lines, the team made approximately four attempts to set a peripheral IV line in the right arm, and two in the left.
6. The log indicates that after the team made the multiple unsuccessful attempts to set peripheral IV lines, the IV Team Leader recommended that the team set a femoral line as the primary line, and a left peripheral as back-up.
7. In my medical opinion, it is unreasonable to suggest setting a peripheral line (back-up or otherwise) in a vein in which IV personnel were demonstrably unable to set an IV after multiple attempts.
8. In fact, as medical experience and logical analysis predict, the IV team was ultimately unsuccessful in setting the back-up line in the left peripheral site, as evidenced by the log.



9. I was also provided information regarding Thomas Kemp's execution. I was told that after the lethal injection began, Mr. Kemp's torso and right arm began to shake, and continued to do so for approximately six seconds. It is my understanding that Mr. Kemp was given 5 grams of pentobarbital during his execution. The description presented to me suggests a partial seizure which began shortly after medication administration. The cause of this activity could be related to medication administration, previous head injury or stroke, or a history of seizures.

Signed this 30th day of April, 2012.


Eric D. Katz, M.D.

EXHIBIT BB

EXHIBIT BB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Thomas Paul West, et al.,)	
)	
Plaintiffs,)	No. CV 11-1409-PHX-NVW
vs.)	
)	
Janice K. Brewer, et al.,)	Phoenix, Arizona
)	December 7, 2011
)	9:00 a.m.
Defendants.)	
)	

BEFORE: THE HONORABLE NEIL V. WAKE
UNITED STATES DISTRICT JUDGE

(Bench Trial - Day 3)
(Partial Transcript)

Official Court Reporter:
Laurie A. Adams, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 43
Phoenix, Arizona 85003-2151
(602) 322-7256

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

December 7, 2011 - Bench Trial - Day 3

P R O C E E D I N G S

THE COURT: Please be seated.

And I guess the plaintiffs may call their next witness.

MR. BAICH: Good morning, Your Honor. Plaintiffs call Dr. Eric Katz.

THE COURTROOM DEPUTY: Doctor, come right up here. State your full name for the record and spell your last name.

THE WITNESS: Eric Daniel Katz, K-A-T-Z.

(The witness, Eric Katz, was sworn.)

THE COURT: Please proceed.

ERIC KATZ, M.D.

a witness herein, having been first duly sworn by the clerk to speak the truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KONRAD:

Q. Good morning, Doctor. How are you?

A. Good. Thank you.

Q. You have before you a stack of exhibits that we'll be referring to today, and there's also a monitor where exhibits will be shown.

If we could first -- I'd like you, for the Court, to go through your background. And your CV is attached to your report at Exhibit 258 in front of you in case you need it for

December 7, 2011 - Bench Trial - Day 3

1 opinions that we haven't discussed?

2 A. At the time of the report, no, there were not.

3 Q. And does the report marked as Exhibit 258 briefly summarize
4 your opinions?

5 A. It does.

6 MS. KONRAD: And I'd move to qualify him as a medical
7 expert, Your Honor.

8 THE COURT: Well, he certainly is. It depends on what
9 questions are asked.

10 BY MS. KONRAD:

11 Q. So let's talk about placing central lines. You indicated
12 that you have been trained to place central lines, and for the
13 past 15 years you have taught students and residents to place
14 central lines?

15 A. That's correct.

16 Q. Will you please explain to the Court how a femoral central
17 line is placed? And you have brought a catheter kit with you
18 today, correct?

19 A. Yes.

20 Q. The placement of a central line goes through several
21 distinct steps. Perhaps the most important one of those is
22 actually the setup and the preparation of the patient and the
23 equipment.

24 From there -- may I open it and demonstrate?

25 So once the patient has been positioned, once the skin

December 7, 2011 - Bench Trial - Day 3

1 has been prepped, once the physician has ensured sterile
2 technique, the first step in identifying a vein is actually to
3 use both landmark identification of your target as well as
4 ultrasound identification.

5 The landmark identification is usually found through a
6 series of physical exam findings and a knowledge of anatomy.
7 One of the perks of using ultrasound, though, is that when
8 there are anatomical abnormalities, or things that are a little
9 bit different from normal, the ultrasound shows you those
10 changes before you take any steps.

11 My standard practice, and I think the standard
12 practice with most physicians, is to use ultrasound to identify
13 your target prior to even giving a local anesthetic, and that
14 the local anesthetic is only given once you know where to give
15 it.

16 And so from there, once the patient is anaesthetized,
17 the needle that's used is actually a fairly large needle. And
18 that's used to basically enter the skin and target the vein.
19 Once that has entered into the vein, the trick with the central
20 line is to at that point put down your ultrasound, hold your
21 needle in place while taking off the syringe, and to take your
22 guide wire and thread it through your needle and into the
23 actual vein.

24 The wire is actually what holds the position of your
25 procedure for you. Because before the wire is in the needle is

December 7, 2011 - Bench Trial - Day 3

1 very prone to be moved or to being jostled or to being pushed
2 deeper into the skin. Once the wire is threaded through, the
3 needle is taken out.

4 Now, I have seen in testimony that there was a lot of
5 mention of the needle being similar to the needle used for an
6 intravenous catheter. And I think that looking at it shows
7 that that's not really the case. It's a much bigger needle.
8 It's a much longer needle. And it's going in a completely
9 different anatomical location. Where the needle is being
10 placed is basically through the skin, and a femoral line needle
11 is going through the skin, through the subQ tissues, through
12 the muscle, and into the vessel itself.

13 Now, once your line is in place, there are a couple of
14 other steps that happen. The first is basically using a
15 scalpel to nick the -- to go through the skin. And the normal
16 way you do that, if you remember the wire is through the skin
17 so everything beneath my fingers --

18 THE COURT: Excuse me, Doctor. Back up for a minute.
19 Where does the use of the scalpel come in in relation to the
20 insertion of the needle?

21 THE WITNESS: So the needle is placed through the skin
22 and the wire is placed through the needle. At that point the
23 needle is taken out of the patient and the scalpel is used to
24 incise the skin right next to where the wire is going in.

25 THE COURT: Go ahead. Continue.

December 7, 2011 - Bench Trial - Day 3

1 THE WITNESS: So the actual most painful part of the
2 procedure is where you take the dilator. And this is a rigid
3 plastic dilator much thicker than the needle itself.

4 BY MS. KONRAD:

5 Q. And just for the record, Doctor, can you describe by -- for
6 the record how big these things are that you are talking about?
7 I mean, she's transcribing so they are not going to be able to
8 see the demonstration. The judge obviously has the benefit of
9 doing that, but can you give a description?

10 A. So the description of the needle is -- I'm sorry. I'm not
11 sure where I have put it right now. The description of the
12 needle is it's approximately three and-a-half inches long. It
13 is a 16 French needle, I believe, and it's on a clear hub with
14 a 5cc syringe attached to it. The wire, I'm not sure of the
15 size of it. It's a standard introducer wire.

16 The introducer piece itself is several millimeters
17 across, probably four or five millimeters across. And so at
18 the step that we're at now, the wire's through the skin, the
19 skin has been cut with the scalpel. And at this point, this is
20 the painful part because the introducer is what's going to bore
21 a hole from the skin all the way through to the vein, bore a
22 hole into the vein itself. So that's brought down from the
23 skin in a twisting motion all the way down. And what that does
24 is separates out the tissues so your softer catheter can then
25 follow.

December 7, 2011 - Bench Trial - Day 3

1 So at that point, you take this firm catheter out of
2 the patient.

3 THE COURT: Now, Doctor, what have you accomplished
4 with that firm catheter?

5 THE WITNESS: The path of the wire is much thinner
6 than the path of the catheter here. So by using the dilator
7 you have essentially cleared out a wider path for the catheter
8 to come down through.

9 THE COURT: Is that clearing out within the vein or in
10 the tissue outside the vein?

11 THE WITNESS: It's actually clearing out from the skin
12 all the way through to and including the vein. So it's pushing
13 subcutaneous fat. It's pushing muscle tissue. It's pushing
14 skin.

15 THE COURT: All right.

16 THE WITNESS: And so at this point in the procedure,
17 you are going to thread the catheter over the wire and the
18 catheter itself is a little shorter -- is a little narrower
19 than the width of the dilator itself but it's a little bit
20 softer plastic. So you are going to thread the catheter
21 through down into the vein and at that point you are going to
22 pull out your wire and you now have a secured position of your
23 secured femoral line within the vein.

24 At that point there are two side pieces to the hub of
25 the catheter and those are then sutured to the skin with a

December 7, 2011 - Bench Trial - Day 3

1 needle and usually a 3-0 suture.

2 And so this whole process I have seen described as
3 painful as an IV needle and that doesn't make a lot of sense to
4 me. When you have done these often enough, what you realize is
5 that, first of all, you have a bigger, firmer, longer needle
6 buried deeper into the skin. You have a firm rigid dilator
7 which is twisted down through the skin. You have a catheter
8 that's placed all the way down. Then there are two more needle
9 sticks on the side of it just to sew it in place.

10 And so the entire process isn't as painless as an IV
11 as has been suggested.

12 THE COURT: But, Doctor, what is the consequence of
13 applying a local anesthetic before this procedure has begun?

14 THE WITNESS: That's an excellent question.

15 So most of the kits will come with a small vial of
16 lidocaine. Each kit is a little bit different. This kit comes
17 with a 5cc bottle of lidocaine. And actually when I do these
18 procedures I actually take this and kind of toss it away and
19 get a bigger bottle of lidocaine. The reason is lidocaine will
20 only work in the vicinity in which it's placed into the
21 patient. A small amount of lidocaine would only deaden the
22 nerves that it touches.

23 So if inadequate lidocaine is used, then the areas
24 outside of its perimeter are completely un-anaesthetized. Now,
25 when you do use lidocaine, it usually numbs up the surface of

December 7, 2011 - Bench Trial - Day 3

1 the skin and the area right underneath it. The key part of
2 using lidocaine correctly, though, is to try and instill the
3 lidocaine along the entire path that the needle and the
4 catheter are going to go through. That's very tricky, because
5 you may not know that path at the start. And that's why
6 generous amounts of lidocaine are always used.

7 BY MS. KONRAD:

8 Q. Thank you for that description.

9 Now that you have explained how to set a central line,
10 let's turn to your report and the opinions that you reached in
11 reviewing the documents in this case.

12 If you could, please give the Court a brief overview
13 of your opinion regarding the placement of the femoral central
14 lines in the five prisoners. So what I'm doing is starting
15 with number one on your report.

16 A. So one of the first set of documents that I was able to
17 review were the pictures of the scene and also the pictures
18 from the autopsy reports there. And there was a trend there
19 that was clearly non-standard. And that trend was that the
20 actual placement of the catheter was in an incorrect position
21 and an incorrect orientation on four of the five inmates who
22 had a central line placed.

23 Q. Okay. So you noticed that -- I think you have marked here
24 that they are placed in an orientation where the catheter
25 points laterally. What other things did you also notice?

December 7, 2011 - Bench Trial - Day 3

1 position can make it difficult. The size of the vein can make
2 it difficult. The presence of a clot in the vein can also make
3 it difficult.

4 Q. So what does his opinion demonstrate to you, Doctor?

5 A. Again, I'm concerned that he's learned the wrong lessons in
6 placing central lines and I'm concerned that he's not
7 recognizing some of the things that we teach for people to look
8 for before placing a central line.

9 His deposition, I think, from 2008 reported that when
10 he missed it was always because of anatomy. I would like to be
11 able to say that every time I have struggled with a central
12 line it's because of anatomy, but there has to be an
13 identification of the fact that maybe the anatomy is off
14 because you don't know what to expect.

15 Q. And what complications could arise from placement of a --
16 or attempted placement of a femoral central line?

17 A. In the acute part, where -- in the time when you are
18 actually placing the line, the major complication is hitting
19 the femoral artery, which is both somewhat uncomfortable and
20 also it can distort your landmarks and provide some
21 interference before you place the central line in the femoral
22 vein, in the femoral vein rather than in the artery.

23 So if you hit the artery, it can actually leak blood
24 around the femoral vein. And since when you are going in you
25 are aspirating, you may be actually aspirating the hematoma

December 7, 2011 - Bench Trial - Day 3

1 rather than in the vein itself.

2 So that's usually the one that's most common. There
3 are a few others that are reported there. There are reports of
4 tearing the femoral vein and there are reports of even hitting
5 the bladder from an inappropriate femoral vein.

6 Q. And do you have similar complications when attempting to
7 set a peripheral IV?

8 A. No, you don't.

9 Q. So summing up your testimony regarding the Medical Team
10 Leader's practice, training, and understanding of placing a
11 central line, what is your ultimate opinion regarding that?

12 A. My ultimate opinion is that I don't see physicians
13 requiring assistance 50 percent of the time, and I don't see
14 this many central lines placed that need repeated needle sticks
15 to gain access.

16 So given his deposition, his description of his
17 training, his recognition of common complicating factors, I
18 don't think he's up to the standard when it comes to placing
19 these lines.

20 THE COURT: What do you mean, "up to the standard."
21 What standard?

22 THE WITNESS: I think his performance is demonstrated
23 to be below that of my residents in training.

24 THE COURT: Well, I'm trying to understand what that
25 means. Are you offering an opinion -- have you ever testified

EXHIBIT CC

EXHIBIT CC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Thomas Paul West, et al.,)	
)	
Plaintiffs,)	No. CV 11-1409-PHX-NVW
vs.)	
)	
Janice K. Brewer, et al.,)	Phoenix, Arizona
)	December 6, 2011
)	9:00 a.m.
Defendants.)	

BEFORE: THE HONORABLE NEIL V. WAKE
UNITED STATES DISTRICT JUDGE

(*Bench Trial - Day 2*)
(Redacted)

Official Court Reporters:
Laurie A. Adams, RMR, CRR
Merilyn A. Sanchez, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 43
Phoenix, Arizona 85003-2151
(602) 322-7256

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

December 6, 2011 - Bench Trial - Day 2

1 MEDICAL TEAM LEADER,
2 a witness herein, having been first duly sworn by the clerk to
3 speak the truth and nothing but the truth, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MS. KONRAD:

7 Q. Good morning.

8 A. Good morning.

9 Q. And you are aware that the courtroom is sealed today,
10 correct?

09:07:17

11 A. Yes.

12 THE COURT: And let me be clear. I will repeat what I
13 previously said.

14 It is ordered that the testimony of this witness is
15 sealed, the courtroom is sealed. And the transcript which will
16 be prepared will be redacted to protect the identity of the
17 witness and will be reviewed by plaintiffs' counsel to assure
18 that that is achieved -- and defendant's counsel -- before we
19 file the transcript with the records of the Court.

09:07:24

20 All right. Please proceed.

09:07:44

21 MS. KONRAD: I would like to take a few minutes to go
22 over your background, sir. If I could introduce Exhibit 207,
23 which is a CV that you had provided.

24 And I move to have that admitted.

25 THE COURT: Exhibit 207 is admitted.

09:08:01

December 6, 2011 - Bench Trial - Day 2

1 Q. Why is that your preference?

2 A. I believe that the central line is more reliable and less
3 likely to cause pain, discomfort, to the inmate.

4 Q. And why do you say it's less likely to cause pain and
5 discomfort to the prisoner?

09:49:07

6 A. Because the chemicals which are administered are known to
7 cause pain if not administered appropriately.

8 Q. Which chemicals are known to cause pain?

9 A. Pentothal or pentobarbital and potassium chloride.

10 Q. And what type of pain is caused by pentothal being
11 administered?

09:49:30

12 A. I'm not sure exactly what kind of pain. I think it would
13 be described by most patients or inmates as like a burning
14 pain.

15 Q. And pentothal burns if what?

09:49:48

16 A. Well, it's toxic to tissues, so mostly you would have pain
17 if it was extravasating outside of the vein into the
18 subcutaneous tissue. But if it's given in a high enough
19 concentration in a smaller vein, then that will also cause
20 pain.

09:50:17

21 Q. Okay. And is it your opinion that the concentration level
22 of the sodium thiopental or pentothal that's administered in
23 Arizona as part of the lethal injection protocol is a
24 concentration that would in and of itself cause pain if
25 administered?

09:50:42

December 6, 2011 - Bench Trial - Day 2

1 A. I think that's my opinion, yes.

2 Q. And so to what degree of medical certainty would
3 somebody -- take that back.

4 You say that somebody would feel pain from
5 administering the pentothal in the concentration level that it
6 is given in Arizona's protocol through a smaller vein, correct?

09:51:05

7 A. Correct.

8 Q. And would you agree that that would be a peripheral vein?

9 A. I think my opinion on that is that if the vein was distal,
10 or down, away from the elbow, that it would most likely cause
11 discomfort.

09:51:30

12 Q. So if it was administered at the elbow, it would not cause
13 discomfort?

14 A. I don't think so. Well, I shouldn't say that. It may.

15 Everybody -- every individual is different but much less likely
16 to.

09:51:54

17 Q. So your preference is to administer the chemicals, the
18 drugs, through the femoral line because if you administer it
19 through a smaller vein it could cause pain, correct?

20 A. And the risk of extravasation.

09:52:26

21 Q. And what causes extravasation?

22 A. Whenever a peripheral IV is placed there's a pretty good
23 chance that there will be a slight puncture through the vein.
24 And if a chemical or a fluid is given at a high rate under
25 pressure then that puncture could rupture out and then the

09:52:45

EXHIBIT DD

EXHIBIT DD

Declaration of Angela Fairchild

1. My name is Angela Fairchild, and I am employed as a Paralegal with the Office of the Federal Public Defender for the District of Arizona ("FPD").
2. I am the paralegal assigned to the case *Towery v. Brewer*, Case No. 2:12-CV-00245 (D. Ariz.).
3. On March 22, 2012, our office was provided a copy of documents related to the executions of Robert Moormann and Robert Towery by the Attorney General's Office.
4. Attached to my declaration are unaltered copies of several pages that were included in the documents we received.
5. Attachment 1 is a log from Robert Towery's execution labeled Correctional Service Log, Housing Unit 9 Section Leader, dated 3/8/12.
6. Attachment 2 is a log from Robert Towery's execution labeled Correctional Service Log, Housing Unit 9 Special Operations, dated 3/8/12.
7. Attachment 3 is a document labeled Execution Log, Towery, ADC #051550.
8. Attachment 4 is a log from Robert Moormann's execution labeled Correctional Service Log, Housing Unit 9 Section Leader, dated 2/29/12.
9. Attachment 5 is a log from Robert Moormann's execution labeled Correctional Service Log, Housing Unit 9 Special Operations, dated 2/29/12.
10. Attachment 6 is a document labeled Execution Log, Moormann, ADC # 31293.

I declare under penalty of perjury the following to be true to the best of my information and belief:

Signed this 30th day of April 2012, in Phoenix, Arizona.



Angela Fairchild

Attachment 1

Attachment 1



ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Institution/Facility ASPC-Florence		Institutional Unit Central Unit		Period Covered Hour 0900 Date 03/08/12 Hour 1205 Date 03/08/12			
Housing Unit/Post/Duty Assignment Housing Unit 9 Section Leader							
Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
HU9 Section Leader		0600	1205				
HU9 Recorder		0830	1205				
Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.						Staff Initials
0900	Execution table is prepared at least two hours prior to scheduled time of execution.						
0930	All items removed from inmate's cell (linen, property, etc.)						
0930	Housing Unit 9 Section Leader advises Director that inmate is ready for search and restraint; request permission to proceed.						
0930	Condemned inmate to be placed in upper restraints by restraint/escort team after strip search.						
0935	Director's briefing:						
	Inmate Towery's attorney told him to ask the Director two questions -						
	1) What is the protocol? 2) Where were the drugs obtained?						
	Inmate Towery stated it was not necessary but in order to console the inmate the Director answered both questions.						
	The Director asked inmate Towery if he received the letter						
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)							

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
	advising the protocol to be used. Inmate Towery acknowledged	
	the letter he received advising the one drug protocol would	
	be used. The Director advised inmate Towery the chemicals	
	were lawfully obtained in the United States. Deacon Sheffer	
	had advised the Director earlier that inmate Towery was in a	
	good place and he had asked inmate Towery to cooperate.	
0938	Restraint Team Leader notifies Housing Unit 9 Section Leader	
	that inmate is restrained and the team is ready.	
0939	The Director picks up the red phone and makes a check to	
	ascertain if the execution may proceed. If there is no delay	
	in the procedure, the Director informs Housing Unit 9 Section	
	Leader, "We may proceed with movement."	
0940	When signaled by Housing Unit 9 Section Leader, the Restraint	
	Escort team removes the inmate from cell; apply lower	
	restraints and proceed with movement.	
0940	Restraint Team Leader checks with Housing Unit 9 Section	
	Leader before proceeding with movement of inmate.	

Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0940	Condemned inmate escorted to Execution Room; one staff in front, two at the inmate's sides; Team Leader behind.	
	Support staff behind Team Leader.	
0948	Inmate secured by chest and ankle straps; Team Leader at head of table, two at arms, two at feet.	
0948	Secure wrists with soft restraints.	
0948	Secure arms (maintain good circulation).	
0948	Secure upper torso.	
0948	Secure legs (maintain good circulation).	
0949	Restraint/Escort Team Leader checks all restraints. Team moves back to holding area, Team Leader at door. Remove any item not part of the event.	
0949	Housing Unit 9 Section Leader advises the Director inmate is secure on table and requests approval to proceed with IV procedure.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0952	The Director, acting upon the advice of the IV Team Leader, shall determine the catheter(s) site(s).	
1028	After multiple attempts of the left and right peripheral - (approximately 4 in right - 2 in left), IV Team Leader recommended right femoral as primary and left peripheral as back- up.	
1031	Director calls the Attorney General's Office and provides an update regarding the IV process	
1037	The Director spoke with Jeff Zick at the Attorney General's Office.	
1050	Right femoral was successful; left peripheral was unsuccessful. Discussion held with the Director and the IV Team Leader regarding back-up catheter. Right hand peripheral was decided as back-up and was successful at 1059.	
1059	Restraint/Escort Team Leader and Housing Unit 9 Section Leader positioned in Execution room. Special Ops Team Leader inside of the chemical room. Inmate is secured to table with IV flowing, EKG functioning.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1059	Housing Unit 9 Section Leader advises Director that IV procedure is complete.	
1103	Housing Unit 9 Section Leader advises Command to begin movement of witnesses to Housing Unit 9.	
1104	Command directs movement of witnesses to Housing Unit 9 in the following order: Inmate Witnesses, Media Witnesses, Official Witnesses, Victim Witnesses. <i>(no victim witnesses attended)</i>	
1113	Command advises Housing Unit 9 Section Leader that all witnesses are in place.	
1113	Housing Unit 9 Section Leader advises Director that witnesses are in position and requests authorization to proceed.	
1114	The Director picks up the red phone and makes a final check to ascertain if the execution may proceed. If there is no delay in the procedure, the Director informs Housing Unit 9 Section Leader, "We may proceed."	
1115	With permission from Director and confirmation to proceed, Housing Unit 9 Section Leader opens curtains.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1115	Housing Unit 9 Section Leader reads the Execution Order.	
1116	Housing Unit 9 Section Leader asks inmate if he would like to make a last statement.	
1117	Inmate makes his last statement.	
1122	Housing Unit 9 Section Leader advises witnesses the inmate has been sedated.	
1126	Director informed of death by Special Ops. Team Leader.	
1126	Director advises witnesses that the execution is concluded.	
1127	Housing Unit 9 Section Leader closes the curtains.	
1130	Housing Unit 9 Section Leader notifies Command to proceed with removal of witnesses.	
1134	Housing Unit 9 Section Leader instructs IV Team to cut lines to IV's.	
1137	CIU Investigator examines the body.	
1137	Coroner/Medical Examiner examines the body.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1144	Team enters and removes restraints from the inmate; the inmate is placed on a gurney.	
1144	Restraint/Escort Team assists Coroner in the removal of the inmate's body.	
1147	Inmate's body is placed in Coroner's vehicle.	
1147	All teams perform clean-up chores.	
1154	The IV and Special Operations Teams will participate in an informal debriefing with the Director and Division Director immediately upon completion of the event.	
	Director: The execution was more challenging because of the mandated order regarding two catheter points. I will be speaking to the Attorney General regarding the attorney visit the morning of the execution. In the past this concluded at 7:00 A.M., not 9:15 A.M. The attorney visit contributed to delay along with the inmates bad veins. The Director thanked everyone for their patience, and advised two more executions are coming up (no dates set yet).	
	Deputy Director [REDACTED] The IV Team expressed their thanks and appreciation for the support received from everyone.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

Correctional Service Log

[illegible]

Attachment 2



Attachment 2



Correctional Service Log

Institution/Facility		Institutional Unit		Period Covered			
ASPC - Florence		Central Unit					
Housing Unit/Post/Duty Assignment				Hour	Date		
Housing Unit 9, Special Operations				Hour	Date		
Staff Member (Last, First M.I. and Title)	Staff	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
SOT Leader							
SOT Recorder							
Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.						Staff Initials
0730	Special Operations and IV Teams assembled for execution of inmate <u>ROBERT</u>						
	<u>Towery</u> <u>ADC # 051550</u>						
0748	Audio, visual, and medical equipment inspected.						
0800	IV Team Leader checked and verified the flow of each gauge and confirmed there						
	are no obstructions in the manifold or lines.						
0840	Commenced the preparation of chemicals and syringes.						
0856	Completed preparing, labeling, and affixing syringes to the manifold.						
0858	Special Operations Team Leader verified that all syringes are properly labeled						
	and affixed in the correct location on the manifold.						
0947	EKG leads, Pulse/Oxygen monitor, and blood pressure cuff attached.						
	Initial blood pressure: <u>141/69</u>						
0952	IV procedure commenced.						
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)							

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff
1059	IV procedure complete. Primary IV catheter placed in inmate's <i>Right</i>	
<i>Femoral</i>	Backup IV catheter placed in inmate's <i>Right Hand</i> .	
1117	Director instructed Special Ops Team Leader to commence with drug protocol:	
1117	• Syringe 1A, 60 mL Heparin/Saline	
1118 ¹⁰	• Syringe 2A, 2.5 gm Pentobarbital	
1118 ¹⁰	• Syringe 3A, 2.5 gm Pentobarbital	
1119	• Syringe 4A, 60 mL Heparin/Saline	
1119.	Drug protocol completed.	
1121 ¹⁰	3 minute point: <i>1122¹⁰</i> . Confirmed 3 minutes have elapsed since	
	commencing the administration of chemicals.	
1122	IV Team Leader assessed consciousness and confirmed the inmate is sedated	
1126.	IV Team Leader pronounces death.	
	Additional entries: <i>N/A.</i>	
	A.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

Attachment 3

Attachment 3

EXECUTION LOG - Towery, ADC #051550	
1/10/12 @ 1607	Rcvd a call from Carl from the AZ Supreme Court advising a Warrant of Execution was issued for inmate Towery; execution set for March 8, 2012. Carl's contact number is: 602-452-3396 (Carl Johanson)
1/10/12	February 2, 2012 is the 35 th day with date of execution of March 8, 2012
1/17/12	Received certified copy of Warrant; advised Eyman for pick-up
2/2/12	Legal call with Therese Day from 1535-1615
2/3/12	Received Inmate Interview Request Form – Inmate Towery declined
2/3/12	Legal call with Therese Day at 1500 hours
2/4/12	No legal activity
2/5/12	No legal activity
2/6/12	Received the following completed forms: Inmate Witness Information Method of Execution Disposition of Property, Notification of Accident, Illness, Death Last Meal Request
2/7/12	Received the following completed forms: Disposition of Remains
2/7/12	Legal call with Therese Day from 1530-1400
2/8/12	Legal call with Therese Day from 1015-1045
2/9/12	Legal call with Nancy Rangel from 1315-1345
2/10/12	Legal call with Nancy Rangel from 1015-1045
2/11/12	Legal call with Therese Day from 1015-1045
2/12/12	Legal call with Therese Day from 1015-1045
2/13/12	Legal call with Natasha Merle and Kimberly Taylor from 1015-1045
2/14/12	Legal call with Keith Helzendenger and Therese Day from 1343-1415
2/15/12	Legal call with Kelly Schneider from 1015-1045
2/16/12	Legal call with Kimberly Taylor from 1215-1245
2/17/12	Legal call with Kimberly Taylor from 1015-1240
2/18/12	Legal call with Therese Day from 1015-1045
2/19/12	Legal call with Dale Baich from 1015-1045
2/20/12	Legal call with Kimberly Taylor from 1015-1045
2/21/12	Legal call with Therese Day from 1025-1055
2/22/12	Legal call with Kimberly Taylor at 1015 Legal call with Nancy Rangel and Therese Day at 1500
2/23/12	Legal call with Dale Baich, Therese Day, Nancy Rangel, Kimberly Taylor, and Jasmine Teter from 1215-1245.
2/24/12	Legal call with Therese Day at 1015
2/25/12	Legal call with Therese Day at 1015
2/26/12	Legal call with Dale Baich at 1015
2/27/12	Legal call with Nancy Rangel from 1505-1535
2/28/12	Legal call with Keith Hilzendenger from 1535-1605
2/29/12	Legal call with Kelly Schneider from 10-15-1045
3/1/12	Legal call with Dale Baich and Nancy Rangel from 12/15-1240
3/1/12	Received Inmate Interview Request Form – Inmate Towery declined
3/2/12	Legal call from Nancy Rangel from 1230-1245
3/3/12	No legal activity
3/4/12	No legal activity
3/5/12	Legal call with Therese Day from 1015-1045
3/6/12	Legal call with Therese Day from 1015-1045
3/7/12	Legal call with Nancy Rangel from 1615-1646
3/7/12	Inmate consumed all food provided to him:

	2 20oz bottles of pepsi 1 tumbler ice 1 13oz porterhouse steak (deboned) 1 baked potato w/ butter and sour cream 1 cup sautéed mushrooms 1 serving asparagus with cheese sauce 1 cup clam chowder 1 pint 2% milk 1 slice apple pie with 2 scoops vanilla ice cream Began meal at 1800, Finished meal at 1845.
3/8/12	Legal visit (0700-0800) with Kelly Schneider and Natasha Merle Legal visit (0815-0915) with Dale Baich and Therese Day
3/8/12	Time of Death 1126.

Attachment 4

Attachment 4



ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Institution/Facility ASPC-Florence		Institutional Unit Central Unit		Period Covered Hour <u>0900</u> Date <u>2/29/12</u> Hour <u>1100</u> Date <u>2/29/12</u>			
Housing Unit/Post/Duty Assignment Housing Unit 9 Section Leader							
Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
HU9 Section Leader		0600	1100				
HU9 Recorder		0830	1100				
Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.						Staff Initials
0915	Execution table is prepared at least two hours prior to scheduled time of execution.						
0915	All items removed from inmate's cell (Linen, property, etc)						
0930	Housing Unit 9 Section Leader advises Director that inmate is ready for search and restraint; request permission to proceed.						
0939	Condemned inmate to be placed in upper restraints by restraint/escort team after strip search.						
0939	Restraint Team Leader notifies Housing Unit 9 Section Leader that inmate is restrained and the team is ready.						
0940	The Director picks up the red phone and makes a check to ascertain if the execution may proceed. If there is no delay in the procedure, the Director informs Housing Unit 9 Section Leader, "We may proceed with movement".						
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)							

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0940	When signaled by Housing Unit 9 Section Leader, the Restraint/	
	Escort team removes the inmate from cell. Apply lower	
	restraints and proceed with movement.	
0942	Restraint Team Leader checks with Housing Unit 9 Section Leader	
	before proceeding with movement of inmate.	
0942	Condemned inmate escorted to Execution Room; one staff	
	in front, two at the inmate's sides, Team Leader behind.	
	Support staff behind Team Leader.	
0950	Inmate secured by chest and ankle straps, Team Leader at head	
	of table, two at arms, two at feet.	
0950	Secure wrists with soft restraints.	
0950	Secure arms (maintain good circulation).	
0950	Secure upper torso.	
0950	Secure legs (maintain good circulation).	
0950	Restraint/Escort Team Leader checks all restraints. Team	
	moves back to holding area, Team Leader at door. Remove any	
	item not part of the event.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0951	Housing Unit 9 Section Leader advises the Director inmate is secure on table and requests approval to proceed with IV procedure.	
0955	The Director, acting upon the advise of the IV Team Leader, shall determine the catheter(s) site(s).	
1005	Restraint/Escort Team Leader and Housing Unit 9 Section Leader positioned in Execution room. Special Ops Team Leader inside of the chemical room. Inmate is secured to table with IV flowing, EKG functioning.	
1005	Housing Unit 9 Section Leader advises Director that IV procedure is complete.	
1008	Housing Unit 9 Section Leader advises Command to begin movement of witnesses to Housing Unit 9.	
1009	Command directs movement of witnesses to Housing Unit 9 in the following order: Inmate Witnesses, Media Witnesses, Official Witnesses, Victim Witnesses.	
1019	Command advises Housing Unit 9 Section Leader that all witnesses are in place.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials	
1019	Housing Unit 9 Section Leader advises Director that witnesses are in position and requests authorization to proceed.		
1019	The Director picks up the red phone and makes a final check to ascertain if the execution may proceed. If there is no delay in the procedure, the Director informs Housing Unit 9 Section Leader, "We may proceed".		
1021	With permission from Director and confirmation to proceed, Housing Unit 9 Section Leader opens curtains.		
1022	Housing Unit 9 Section Leader reads the Execution Order		
1022	Housing Unit 9 Section Leader asks inmate if he would like to make a last statement.		
1023	Inmate makes his last statement.		
1028	Housing Unit 9 Section Leader advises witnesses the inmate has been sedated.		
1033	Director informed of death by Special Ops Team Leader.		
1033	Director advises witnesses that the execution is concluded.		
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)			

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1033	Housing Unit 9 Section Leader closes the curtains.	
1034	Housing Unit 9 Section Leader notifies command to proceed with removal of witnesses.	
1040	Housing Unit 9 Section Leader instructs IV Team to cut lines to IV's	
1041	CIU Investigator examines the body.	
1041	Coroner / Medical Examiner examines the body.	
1050	Team enters and removes restraints from the inmate. The inmate is placed on a gurney.	
1051	Restraint / Escort Team assists Coroner in the removal of the inmate's body.	
1052	Inmate's body is placed in Coroner's vehicle.	
1053	All teams perform clean-up chores.	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

[illegible]

Attachment 5

Attachment 5



Correctional Service Log

Institution/Facility ASPC - Florence		Institutional Unit Central Unit		Period Covered Hour <u>0640</u> Date <u>02-29-12</u> Hour <u>1050</u> Date <u>02-29-12</u>			
Housing Unit/Post/Duty Assignment Housing Unit 9, Special Operations							
Staff Member (Last, First M.I. and Title)	Staff	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
SOT Leader		0640	1050				
SOT Recorder		0640	1050				
Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.						Staff Initials
0640	Special Operations and IV Teams assembled for execution of inmate						
0852	Audio, visual, and medical equipment inspected.						
0904	IV Team Leader checked and verified the flow of each gauge and confirmed there						
/	are no obstructions in the manifold or lines.						
0907	Commenced the preparation of chemicals and syringes.						
0921	Completed preparing, labeling, and affixing syringes to the manifold.						
0921	Special Operations Team Leader verified that all syringes are properly labeled						
/	and affixed in the correct location on the manifold.						
0949	EKG leads, Pulse/Oxygen monitor, and blood pressure cuff attached.						
/	Initial blood pressure: 145 / 77						
0956	IV procedure commenced.						
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)							

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1000	IV procedure complete. Primary IV catheter placed in inmate's <u>LEFT</u>	
—	<u>Peripheral</u> Backup IV catheter placed in inmate's <u>Right Peripheral</u>	
1023	Director instructed Special Ops Team Leader to commence with drug protocol:	
1023.	• Syringe 1A, 60 mL Heparin/Saline	
1024 ²⁴	• Syringe 2A, 2.5 gm Pentobarbital	
1025.	• Syringe 3A, 2.5 gm Pentobarbital	
1026.	• Syringe 4A, 60 mL Heparin/Saline	
1026.	Drug protocol completed.	
1027 ²⁴	3 minute point: <u>1027²⁴</u> . Confirmed 3 minutes have elapsed since commencing the administration of chemicals.	
1028	IV Team Leader assessed consciousness and confirmed the inmate is sedated	
1033	IV Team Leader pronounces death.	
	Additional entries: <u>NONE</u>	
	A. <u>N/A</u>	
Shift Commander's Comments: (Notes or comments concerning entries above; comments deemed appropriate)		

Correctional Service Log

[illegible]

Attachment 6

Attachment 6

EXECUTION LOG - Moorman, ADC #31293	
1/10/12 @ 1607	Rcvd a call from Carl from the AZ Supreme Court advising a Warrant of Execution was issued for inmate Moorman; execution set for February 29, 2012. His contact number is: 602-452-3396 (Carl Johanson)
1/10/12	January 25, 2012 is the 35 th day with date of execution of February 29, 2012.
1/17/12	Received certified copy of Warrant; advised Eyman for pick-up.
1/26/12	Legal visit w/ Denise Young (1000-1200)
1/27/12	Legal call w/ Attorney Julie Hall from 0930 - 0950.
1/27/12	Received the following completed forms: Disposition of Property Last Will and Testament
1/28/12	No legal activity
1/29/12	No legal activity
1/30/12	No legal activity
1/31/12	No legal activity
1/31/12	Received the following completed forms: Method of Execution
2/1/12	Legal call w/ Attorney Julie Hall. 0945 - 1000
2/2/12	No legal activity. Received the following completed forms: Disposition of Remains Inmate Witness Information Last Meal Request
2/3/12	Received Inmate Interview Request Form - Inmate Moorman declined.
2/3/12	Legal call with attorney Julie Hall from 0940-1010
2/3/12	Received letter from AZ Board of Executive Clemency. Reprieve/Commutation of Sentence hearing is scheduled for 2/24/12 at 0830 at Rynning Unit.
2/4/12	Legal call with Julie Hall at 0930.
2/5/12	Legal call with Julie Hall at 0930.
2/6/12	Legal call with Denise Young at 0930.
2/7/12	Legal call with Julie Hall from 0930-1000.
2/8/12	Legal call with Julie Hall from 0935-1005.
2/9/12	No legal activity
2/10/12	Legal call with Julie Hall from 0935-1005.
2/11/12	Legal call with Julie Hall from 0930-1000
2/12/12	Legal call with Denise Young from 0930-1000
2/13/12	Legal call with Denise Young from 0930-1000
2/14/12	No legal activity
2/15/12	Legal call with Denise Young from 0940-1010
2/16/12	No legal activity
2/17/12	No legal activity
2/18/12	Legal call with Julie Hall from 0930-1000
2/19/12	Legal call with Denise Young from 0930-1000
2/20/12	No legal activity
2/21/12	No legal activity
2/22/12	Legal call with Julie Hall from 1050-1120
2/22/12	Received letter from Director to Moorman regarding 3 drug protocol.

2/23/12	No legal activity
2/24/12	Attended Clemency Hearing (0800 - 1330)
2/25/12	Legal call with Denise Young at 0930
2/26/12	Legal call with Julie Hall at 0930
2/27/12	Legal call with Denise Young at 0930
2/27/12	Received letter from Director to Moormann regarding one-drug protocol
2/28/12	Received Inmate Interview Request Form – Inmate Moormann declined.
2/28/12	No legal calls
2/29/12	Legal visit with attorney's Julie Hall and Denise young from 0715-0915
2/29/12	Time of death 1033 hours.

EXHIBIT EE

EXHIBIT EE

Arizona Department of Corrections



1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov



CHARLES L. RYAN
DIRECTOR

RECEIVED

JANICE K. BREWER
GOVERNOR

FEB - 9 2012

CLERK SUPREME COURT

February 9, 2012

FILED

FEB - 9 2012

RACHELLE M. RESNICK
CLERK SUPREME COURT
BY:

Rachelle M. Resnick
Clerk of the Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-85-0115-AP
Pinal County Superior Court No. CR-11043

Dear Ms. Resnick:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution set for Wednesday, February 29, 2012 is scheduled to occur on or after 10:00 a.m. on that date.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Wednesday, February 29, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Wednesday, February 29, 2012.

Sincerely,



Charles L. Ryan
Director

EXHIBIT FF

EXHIBIT FF



JANICE K. BREWER
GOVERNOR

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov



CHARLES L. RYAN
DIRECTOR

February 17, 2012

Rachelle M. Resnick
Clerk of the Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-92-0493-AP
Maricopa County Superior Court No. CR-91-92648

Dear Ms. Resnick:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution set for Thursday, March 8, 2012 is scheduled to occur on or after 10:00 a.m. on that date.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Thursday, March 8, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Thursday, March 8, 2012.

Sincerely,


Charles L. Ryan
Director

EXHIBIT GG

EXHIBIT GG

Arizona Department of Corrections



JANICE K. BREWER
GOVERNOR

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov



CHARLES L. RYAN
DIRECTOR

March 28, 2012

Janet Johnson
Acting Clerk of the Arizona Supreme Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-93-0332-AP
Pima County Superior Court No. CR-38826

Dear Ms. Johnson:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution of inmate Thomas Arnold Kemp is set for Wednesday, April 25, 2012 and is scheduled to occur on or after 10:00 a.m. on that date. The inmate has chosen lethal injection as the method of execution.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Wednesday, April 25, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Wednesday, April 25, 2012.

Sincerely,

A handwritten signature in black ink, appearing to read "CLR", with a long horizontal stroke extending to the right.
Charles L. Ryan
Director

CLR/hp

Arizona Supreme Court No. CR-93-0332-AP
Pima County Superior Court No. CR-38826
March 28, 2012
Page 2

cc: Thomas Arnold Kemp, ADC #099144, ASPC-Eyman
Kent E. Cattani, Unit Chief, Capital Appeals, Arizona Attorney General's Office
Barbara Lawall, County Attorney, Pima County Attorney's Office
Duane Belcher, Executive Director, Arizona Board of Executive Clemency
Honorable Roslyn O. Silver, Chief Judge, U.S. District Court for the District of Arizona
Honorable Frank R. Zapata, Judge, U.S. District Court for the District of Arizona
William K. Suter, Clerk, U.S. Supreme Court
Molly Dwyer, Clerk, U.S. Court of Appeals for Ninth Circuit
Brian Karth, Clerk, U.S. District Court for the District of Arizona
Kristine Fox, Capital Case Staff Attorney, U.S. District Court for the District of Arizona
Honorable Sandra R. Simmons, Presiding Judge, Pima County Superior Court
Honorable Richard D. Nichols, Presiding Family Court Judge, Pima County Superior Court
Patricia A. Noland, Clerk of the Court, Pima County Superior Court
Joseph Sciarrotta, General Counsel, Office of the Governor
Karyn E. Klausner, General Counsel, Arizona Department of Corrections
Dan Levey, Victim Services Division, Arizona Attorney General's Office
Heather Tanner, Victim Services Division, Arizona Attorney General's Office
Amy Bocks, Victim Services Division, Arizona Attorney General's Office
Amy Sara Armstrong, Arizona Capital Representation Project
Dale A. Baich, Federal Public Defender's Office
Diane Alessi, Capital Case Staff Attorney, Arizona Death Penalty Judicial Assistance Program
File

EXHIBIT HH

EXHIBIT HH



JANICE K. BREWER
GOVERNOR

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov



CHARLES L. RYAN
DIRECTOR

April 16, 2012

Janet Johnson
Acting Clerk of the Arizona Supreme Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-90-0247-AP
Maricopa County Superior Court No. CR-163419

Dear Ms. Johnson:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution of inmate Samuel Villegas Lopez is set for Wednesday, May 16, 2012 and is scheduled to occur on or after 10:00 a.m. on that date.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Wednesday, May 16, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Wednesday, May 16, 2012.

Sincerely,

A handwritten signature in black ink, appearing to read "CLR", with a long horizontal line extending to the right.

Charles L. Ryan
Director

CLR/hp

EXHIBIT II

EXHIBIT II



JANICE K. BREWER
GOVERNOR

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-6497
www.azcorrections.gov



CHARLES L. RYAN
DIRECTOR

April 20, 2012

Samuel Villegas Lopez, ADC #043833

RE: Choice of Protocol

Mr. Lopez:

The purpose of this correspondence is to notify you that the one-drug protocol using Pentobarbital will be used to carry out the execution. This one-drug protocol is outlined in Department Order 710 Attachment D, Chemical Chart D.

If you have any questions you may direct them to your attorney who is receiving a copy of this notification, as well.

Regards,

A handwritten signature in black ink, appearing to read "CL Ryan", with a long horizontal line extending to the right.

Charles L. Ryan
Director

cc: Kelley J. Henry, Supervisory Asst. Federal Public Defender, Attorney for Inmate Lopez
Denise Young, Co-Counsel for Inmate Lopez
Dawn Northup, General Counsel- ADC
Kent Cattani, Division Chief, Capital Appeals, Arizona Attorney General's Office
Jeff Zick, Section chief, Capital Appeals, Arizona Attorney General's Office
Robert Patton, Division Director, Offender Operations
Ron Credio, Warden, ASPC-Eyman
Lance Hetmer, Warden, ASPC-Florence

EXHIBIT JJ

EXHIBIT JJ



JANICE K. BREWER
GOVERNOR

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
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CHARLES L. RYAN
DIRECTOR

April 2, 2012

Dale Baich
Federal Public Defender's Office
Capital Habeas Division
850 W. Adams, Suite 201
Phoenix, AZ 85007

Re: Visitation with Inmate Kemp

Mr. Baich:

In response to your letter of March 28, 2012, please be advised that ADC's current policy regarding attorney-client visitation remains unchanged. Visitation will, however, be allowed from 6:00 a.m. to 7:00 a.m. on the morning of Mr. Kemp's scheduled execution. As you know, attorney-client visitation on the mornings prior to the executions of Mr. Landrigan through Mr. West was permitted each time you requested. Visits with each inmate occurred from 6:00 a.m. to 7:00 a.m. without any complaint from your office.

The recent Ninth Circuit panel decision in *Towery v. Brewer* incorrectly relied on a 2004 protocol referring to visitation. This protocol has long been superseded by Department Order 710. ADC agreed, however to allow the visitation schedule stated in the court's opinion for Mr. Moorman and Mr. Towery, but did not waive the right to exercise of my discretion on the scheduling of future visits with death row inmates.

It is my intention to permit attorney-client visitation, but not pursuant to the outdated 2004 protocol. The pending execution of Mr. Kemp is set for 10:00 a.m. In order for the process to go forward smoothly and without undue delay, visitation will be allowed, if requested, between the hours of 6:00 a.m. to 7:00 a.m.

Regards,

A handwritten signature in black ink, appearing to read "Charles L. Ryan".

Charles L. Ryan
Director

cc: Kent Cattani, Arizona Attorney General's Office
Jeff Zick, Arizona Attorney General's Office
Karyn Klausner, General Counsel
Dawn Northup, General Counsel
Jeff Hood, Deputy Director
Robert Patton, Division Director, Offender Operations
Lance Hetmer, Warden ASPC Florence